Supreme Court, U.S.
FILED

941040 DEC 12 1994

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1994

CITY OF DEARBORN,
Petitioner,
v.
RONALD LOSCHIAVO AND DONNA LOSCHIAVO,
his wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DEBRA A. WALLING*
CITY OF DEARBORN
CORPORATION COUNSEL
DOUGLAS WEBER
ASSISTANT CORPORATION COUNSEL
13615 Michigan Avenue
Dearborn, Michigan 48126-3586
(313) 943-2035

Counsel for Petitioner

Counsel of Record

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

26 pp

QUESTION PRESENTED FOR REVIEW

THE U.S. DISTRICT COURT RULED THAT PREEMPTION OF A LOCAL ORDINANCE CONCERNING THE HEIGHT AND PLACEMENT OF SATELLITE-DISH ANTENNAS DOES NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. § 1983, RELYING ON A DECISION WHICH WAS UPHELD BY THE COURT OF APPEALS OF THE NINTH CIRCUIT. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT REVERSED AND HELD THAT 47 C.F.R. § 25.104 DOES CONFER ENFORCEABLE RIGHTS UNDER 42 U.S.C. § 1983. DOES 47 C.F.R. § 25.104 CREATE ENFORCEABLE RIGHTS, PRIVILEGES, OR IMMUNITIES WITHIN THE MEANING OF 42 U.S.C. § 1983?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the City of Dearborn, petitioner, by and through its counsel and files this petition for a writ of certiorari seeking reversal of the Opinion of the Sixth Circuit Court of Appeals.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit, filed on September 8, 1994, is reproduced in Appendix A. *Loschiavo* v. *City of Dearborn*, 33 F.3d 548 (6th Cir. 1994). The court of appeals' subsequent order denying Dearborn's petition for rehearing en banc, filed on November 22, 1994, is reproduced in Appendix B. The federal district court's order granting Dearborn's motion for summary judgment in part, filed on January 9, 1992, is reproduced in Appendix C. The federal district court's order denying the Loschiavos' motion for recon-

sideration, filed on February 11, 1992, is reproduced in Appendix D. The federal district court's order granting the Loschiavos' request for equitable relief, filed on March 17, 1992, is reproduced in Appendix E.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

The Loschiavos' complaint alleged a federal question under the First and Fourteenth Amendments of the United States Constitution as well as a claim under 42 U.S.C. § 1983, § 1988. They filed this cause of action on December 27, 1990.

On January 9, 1992, Hon. Bernard Friedman granted Dearborn's motion for summary disposition to dismiss the claim under 42 U.S.C. § 1983. Reconsideration was requested by the Loschiavos and denied on February 11, 1992. After a bench trial, Judge Friedman granted equitable relief to the Loschiavos to permit them to keep their satellite dish.

The Loschiavos appealed to the Court of Appeals for the Sixth Circuit on April 16, 1992. The City of Dearborn filed a cross-appeal on April 23, 1992.

The Court of Appeals for the Sixth Circuit affirmed the district court's grant of equitable relief to the Loschiavos and reversed the district court's grant of summary judgment to the City of Dearborn on September 8, 1994. Dearborn filed a petition for rehearing en banc on September 21, 1994 in the Court of Appeals for the Sixth Circuit. That petition was circulated to all active judges of the Court of Appeals for the Sixth Circuit. No judge of the court requested a vote on the suggestion for rehearing en banc. The petition for rehearing was subsequently referred to the original hearing panel. The petition for rehearing was denied by

order filed November 22, 1994. This petition for a writ of certiorari was filed within 90 days of the order by the court of appeals denying the petition for rehearing.

FEDERAL AND STATE STATUTES INVOLVED

This petition involves 42 U.S.C. § 1983, 42 U.S.C. § 1988, 47 U.S.C. § 605, 47 C.F.R. § 25.104 and state statutes Mich. Comp. Laws § 125.581, Mich. Comp. Laws § 125.585(11), and Mich. Comp. Laws § 125.590. This petition also involves Dearborn Zoning Ordinance No. 81-33, § 501-e. These laws are reproduced in Appendix F.

STATEMENT OF THE CASE

On October 13, 1990, the Loschiavos erected a receive-only satellite dish antenna in the backyard of their home in Dearborn, Michigan. The antenna is 10′ in diameter and sits atop a 20′ mast, for a total above-grade elevation of 25′. Dearborn's ordinance permits an antenna 8′ in diameter and a total of 12′ above-grade elevation. Dearborn Ordinance No. 81-33, § 501-e.103(e).

The Loschiavos' next-door neighbor notified the City of the installation. After a Dearborn inspector verified the information, the Loschiavos were issued a Notice of Violation (which is a warning, not a citation) for failing to comply with the ordinance. Dearborn's ordinance also requires residents to obtain a permit from the Dearborn Building and Safety Department and approval from the Dearborn Zoning Board of Appeals in order to erect such a structure. The Loschiavos had not followed this procedure.

Following a hearing on November 28, 1990, the Dearborn Zoning Board of Appeals denied the application for a variance to exceed the size and height requirements of the ordinance and ordered removal of the

antenna. At the hearing, the Loschiavos presented no compelling reasons why compliance with the ordinance could not be achieved. Hence, the board's denial was based on the satellite antenna's size and its location in a fully-developed residential neighborhood in which homes are located in close proximity to one another. The Loschiavos' satellite dish is shown in the photograph, admitted at trial as Defendant's Exhibit 8, included as Appendix H.

As a result of the zoning board's action, the Loschiavos filed suit in the United States District Court for the Eastern District of Michigan, contending that the zoning ordinance violated their rights under the First and Fourteenth Amendments. The Loschiavos also claimed that Dearborn's ordinance was preempted by 47 C.F.R. § 25.104. That F.C.C. regulation preempts local zoning ordinances which "impose unreasonable limitations on, or prevent, reception of satellite-delivered signals by receive-only antennas. . . ." 47 C.F.R. § 25.104; Appendix, F-10. The Loschiavos asserted that a private right of action under 42 U.S.C. § 1983 had been created by the fact that Dearborn's ordinance was preempted by the F.C.C. regulation. They sought permanent injunctive relief, declaratory relief, money damages, and other relief deemed appropriate by the court.

The statutory basis of subject matter jurisdiction in the district court was 28 U.S.C. § 1331 because the Loschiavos alleged federal questions with regard to 47 U.S.C. § 605 and 47 C.F.R. § 25.104, in addition to their First and Fourteenth Amendment claims. The district court maintained subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) over the civil rights action brought under 42 U.S.C. § 1983.

After hearing each party's respective motions for summary judgment on January 9, 1992, the district court held that Dearborn's zoning ordinance did not deprive the Loschiavos of their constitutional rights

under the First and Fourteenth Amendments, and concluded that the F.C.C. regulation at issue did not create enforceable rights, privileges, or immunities within the meaning of 42 U.S.C. § 1983. Accordingly, the district court granted summary judgment in favor of Dearborn on these claims.

A bench trial was held in February 1992 to determine whether the ordinance was preempted by 47 C.F.R. § 25.104. After a trial, the district court ruled that even though the ordinance had a "reasonable and clearly defined health, safety or aesthetic objective," it was preempted by the federal regulation as applied to the Loschiavos. It enjoined the City from enforcing the ordinance as to the Loschiavos.

The Loschiavos appealed the district court's grant of summary judgment in favor of Dearborn to the United States Court of Appeals for the Sixth Circuit. Dearborn then filed a cross appeal concerning the injunction. The court of appeals reversed the district court and held that the Loschiavos have a right to enforce 47 C.F.R. § 25.104 under 42 U.S.C. § 1983. The district court's grant of injunctive relief was affirmed.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS' CONCLUSION THAT AN ENFORCEABLE RIGHT UNDER 42 U.S.C. § 1983 FOR PREEMPTION OF A LOCAL ZONING ORDINANCE BY FEDERAL REGULATION 47 C.F.R. § 25.104 EXISTS, IS ERRONEOUS AND CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

In this case, it was held by the district court that 47 C.F.R. § 25.104 preempts Dearborn's ordinance which regulates satellite dish antennas as applied to the Loschiavos. This conclusion was reached after an

exhaustive review of all the pertinent facts presented. The court arrived at this conclusion after the Loschiavos' presentation of testimony at trial which indicated that the presence of mature trees in the neighborhood impeded their ability to comply with the Dearborn ordinance and still receive adequate reception.

While the district court did find that the Dearborn ordinance was preempted by 47 C.F.R. § 25.104, the court declined to find that such preemption gave rise to a cause of action under 42 U.S.C. § 1983. The court based its conclusion upon the holding of *Johnson* v. *City of Pleasanton*, 781 F. Supp. 632 (N.D. Cal. 1991), a similar case originating out of the Ninth Circuit.

As in the case at hand, *Johnson* also involved a municipality's denial of a satellite dish antenna which did not comply with a local ordinance. Like the district court in this case, the *Johnson* court also held that the ordinance was preempted by 47 C.F.R. § 25.104. After a thorough analysis of applicable decisions of this Court, it was held that — even though the ordinance was preempted — no private right of enforcement existed under 42 U.S.C. § 1983. It should be noted that the *Johnson* case was subsequently affirmed by the U.S. Court of Appeals for the Ninth Circuit with respect to this issue and the constitutional claims. *See Johnson* v. *City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992).

In its Opinion, the court of appeals declined to either reject or distinguish *Johnson*. Its silence is troublesome given the district court's reliance on *Johnson*. Furthermore, the court's decision in the case at hand has now created a split of authority on this issue which impacts all municipalities. This problem is further compounded by the lack of uniformity among local ordinances regulating satellite dish antennas. Dearborn respectfully urges the Court to resolve this conflict by adopting the rationale of the Ninth Circuit.

In *Johnson*, the Court of Appeals for the Ninth Circuit affirmed the district court's decision that 47 U.S.C.

§ 605(b) and 47 C.F.R. § 25.104 do not meet the tests set forth in either *Wilder* v. *Virginia Hospital Association*, 496 U.S. 498 (1990) or *Cort* v. *Ash*, 422 U.S. 66 (1975), for establishing the existence of a federal right enforceable under 42 U.S.C. § 1983.

In *Wilder, supra*, this Court set forth three factors which influence whether or not a regulation creates a right enforceable under 42 U.S.C. § 1983:

1. Whether the provision was intended to benefit the plaintiff,
2. Whether the provision creates a binding obligation on the governmental unit rather than merely expressing a congressional preference, and
3. Whether the interest asserted is sufficiently specific as to be within the competence of the judiciary to enforce.

Id. at 509.

Applying both the *Wilder* test and the four-factor test of *Cort, supra*, the *Johnson* court held that the rights and interests created under 47 U.S.C. § 605 are not the kind which Congress intended to be enforced under 42 U.S.C. § 1983. *Johnson*, 781 F. Supp. at 645. The court held that the key in determining whether a statute and/or regulation creates rights enforceable under 42 U.S.C. § 1983 is legislative intent. *Johnson*, 781 F. Supp. at 644, citing *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 431 (1987).

The *Johnson* court found that the statutory language in 47 U.S.C. § 605 and preemption provisions codified at 47 C.F.R. § 25.104 demonstrate a mere "congressional preference" rather than a mandate. For that reason, the *Johnson* court also held that Section 605(b) does not meet the test set forth in *Wilder* for establishing the existence of a federal right enforceable under 42 U.S.C. § 1983.

In reaching this conclusion, the court considered whether or not the right of access to satellite programming was granted under the statute. The court did not accept the fact that 47 U.S.C. § 605 created a binding obligation on state and local governments. *Johnson*, 781 F. Supp. at 644. It noted that the statutory language in 47 U.S.C. § 605, which was heavily relied upon by the F.C.C. in its adoption of 47 C.F.R. § 25.104, actually conflicted with the F.C.C. regulation. While the *Johnson* court recognized that the statute did create certain rights to receive satellite transmissions, the court also recognized that the F.C.C. regulation permits interference by local governments provided it is justified by health, aesthetic or safety goals, and does not impose unreasonable limitations on the use of the satellite antennas. *Id.* at 644. Because of this conflict, the *Johnson* court held that the legislative intent of the regulation was not to create a binding obligation on local governments but, rather, that the regulation created a mere congressional preference to serve as a guide for local governments when regulating satellite receive-only antennas. The logic, analysis, and conclusion in *Johnson* are sound. The district court in the instant case agreed.

Further support for this position is found in the F.C.C.'s prefatory comments to 47 C.F.R. § 25.104. The F.C.C. refers to this rule as "commission policy," Report and Order, 51 Fed. Reg. 5,519, (F.C.C. 1986), "a general national policy statement," *Id.* at 5,524, "a general policy statement," *Id.* at 5,523-5,524, "guidance as to acceptable limits of governmental action," *Id.* at 5,525, and "the policy adopted herein," *Id.* at 5,525. These are terms which suggest a "congressional preference" rather than the "binding obligation" which is necessary to create a cause of action pursuant to 42 U.S.C. § 1983.

Further proof that the F.C.C. did not intend for its policy to create a new binding obligation or new cause of action, lies in its comment that:

> There has been increased interest and publicity surrounding this issue and *we conclude that the large number of cases which might be presented for individual review would place a severe burden on our administrative process. Satellite antenna users who are dissatisfied with the results of any local zoning decision can use the standards adopted here in pursuing any legal remedies they might have.* (Emphasis added.)

Report and Order, 51 Fed. Reg. 5,519, 5,524 (F.C.C. 1986).

The Court of Appeals for the Sixth Circuit, on the other hand, ignored *Johnson*, and concluded that the F.C.C. regulation at issue creates a binding obligation because it sets forth a "clear command: local governments are not to enforce zoning ordinances which impose unreasonable limitations on the uses of satellite antennas." *Loschiavo*, 33 F.3d at 552; Appendix, A-7.

Unfortunately, while the general command may be clear, the F.C.C. expressly declined to provide any guidance as to the regulation's implementation:

> We decline to attach a list of acceptable sample zoning ordinances. As has been repeatedly stated here, our preemption is intended to afford local communities some flexibility. Moreover, a list of specific rules would be incomplete and could lead to circumvention of our objectives.

Report and Order, 51 Fed. Reg. 5,519, 5,525 par. 43, (F.C.C. 1986).

Absent any guidance from the F.C.C., each city was left to devise its own means to comply with the spirit and intent of this policy. Every ordinance your petitioner has obtained from other cities contains different regulations.

The "unreasonable limitations" at issue here are akin to the "reasonable efforts" at issue in *Suter* v. *Artist M.*, 112 S.Ct. 1360 (1992). There, the Court held that the "rea-

sonable efforts" provision of the Adoption Assistance and Child Welfare Act of 1980 was not enforceable in a private action under 42 U.S.C. § 1983, noting the following:

> No further statutory guidance is found as to how reasonable efforts are to be measured. This directive is not the only one which Congress has given to the States, and it is a directive whose meaning will obviously vary with the circumstances of each individual case. How the state was to comply with this directive, and with the other provisions of the Act, was, within the broad limits left up to the State.

Id. at 1368.

Here, as in *Suter*, the regulation at issue "did not create enforceable rights, privileges, or immunities within the meaning of § 1983." *Suter* at 1366 (quoting *Wright*, 479 U.S. at 423). In both cases, no guidance was provided as to the type of "reasonable" regulation that would be considered acceptable. Instead, each local government body was to achieve compliance in its own manner.

While the court of appeals in the case at hand quoted *Suter*, it failed to apply it to the facts of the case at hand. *Loschiavo* at 551, 552. Given this Court's holding in *Suter*, it is difficult to understand how the court of appeals arrived at its conclusion that the regulation at issue creates the type of enforceable rights, privileges or immunities contemplated by 42 U.S.C. § 1983.

II.

THE COURT OF APPEALS STATED THAT "REASONABLENESS" IS EASILY SUSCEPTIBLE OF JUDICIAL EVALUATION, HOWEVER, IT MADE NO ATTEMPT TO EVALUATE THE REASONABLENESS OF DEARBORN'S ORDINANCE.

In its Opinion, the Court of Appeals for the Sixth Circuit states that "the reasonableness standard is readily susceptible of judicial evaluation." *Loschiavo* at 552, 553; A-8. Yet the court made no attempt to evaluate the reasonableness of Dearborn's ordinance. The F.C.C. regulation at issue requires that Dearborn's ordinance "not operate to impose *unreasonable* limitations on, or prevent reception of satellite-delivered signals by receive-only antennas. . . ." 47 C.F.R. § 25.104 (emphasis added); Appendix, F-10.

Assuming, *arguendo*, that this regulation creates a right, it remains an unanswered question of law whether Dearborn's ordinance violates this regulation. The court of appeals erred in holding that the ordinance was a per se violation of the F.C.C. regulation just because of the Loschiavos' unique circumstances. This assumes, incorrectly, that the vast majority of Dearborn's residents are similarly situated and that their reception of satellite signals is frustrated.

The test of reasonableness of a land use regulation is not whether it is unreasonable for a particular individual. However, the court of appeals' holding in this case appears to have applied such a test. A test of that nature is inconsistent with the analysis in *Pennell* v. *City of San Jose*, 45 U.S. 1 (1988). In *Pennell*, this Court evaluated the reasonableness of a land use regulation (a rent control ordinance) based upon whether it represented a rational attempt to accommodate conflicting interests. The Court examined whether the rent control ordinance attempted to accommodate the conflicting interests of protecting tenants from burdensome rent increases, while at the same time, assuring that landlords are

guaranteed a fair return on their investment in order to determine whether the ordinance was reasonable. *Pennell* at 15.

Here, the court of appeals failed to examine the reasonableness of Dearborn's ordinance in any context except that of the Loschiavo property. The court should have evaluated the reasonableness of Dearborn's ordinance based upon whether it accommodates the interests of satellite antenna users, while at the same time advancing clearly defined health, safety and aesthetic objectives.

The district court made a judicial determination that Dearborn's ordinance had a reasonable and clearly defined health, safety and aesthetic objective. Presumably, the district court did so by taking into account many factors, including the small single-family lot sizes in Dearborn. Understandably, reasonableness is susceptible to interpretation and may vary based on the locale. Accordingly, it was error for the court of appeals to make no evaluation of the reasonableness of Dearborn's ordinance.

III.

THE F.C.C. REGULATION REGARDING AMATEUR RADIO ANTENNAS IS COMPARABLE TO THAT OF SATELLITE-DISH ANTENNAS.

It is foreseeable that the decision in this case will also impact local regulation of amateur radio antennas. The federal regulation concerning amateur radio antennas, PRB-1, reproduced in Appendix G, states as follows:

> This document *declares* a limited *preemption* of state and local regulations which preclude amateur communications. (Emphasis added.)

Declaratory ruling, 50 Fed. Reg., 38,813 (F.C.C. 1985); Appendix, G-1.

The language used in PRB-1 allows for utilization of discretion by local governments equal to that provided in 47 C.F.R. § 25.104 for regulation of satellite receive-only antennas. A comparison of these two regulations reveals that there is really no difference between the preemption set forth in PRB-1 and the preemption set forth in 47 C.F.R. § 25.104.

PRB-1 and the impact it has on local governments was discussed at length in *Howard* v. *City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991). In *Howard*, a variance to increase the height of an amateur radio antenna was denied by the City Council. The City's zoning power was preempted by the federal regulation, but, the court declined to find a cause of action under 42 U.S.C. § 1983 existed. "Howard's preemption victory did not vest him with any enforceable rights under 42 U.S.C. § 1983. This is because the supremacy clause merely safeguards federal interests against state infringement, and operates to preempt state regulatory action without creating individual rights." *Id.* at 1380.

The *Howard* opinion also analyzed the F.C.C. regulation in the context of *Wilder* v. *Virginia Hospital Association*, *supra*, and *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989). The court in *Howard* determined that neither the Federal Communications Act nor the F.C.C. regulation created any "binding obligations" on the City.

In its opinion, the Court of Appeals for the Sixth Circuit erroneously distinguished *Howard*. The F.C.C. regulation at issue in *Howard* and the F.C.C. regulation in this case respectively preempt local regulations which inhibit amateur radio and satellite antenna communications.

IV.

THIS CASE IS A LAND USE DISPUTE WHICH SHOULD BE LITIGATED IN THE STATE COURT.

Rather than a civil rights action, this case is actually a land use dispute. Adequate state law remedies exist

which the Loschiavos have chosen to disregard. Prior to the court of appeals' Opinion and Judgment, persons aggrieved by local zoning board decisions appealed to the state courts. It is difficult to believe that the F.C.C. intended to create a right to have appeals concerning the height and placement of satellite antenna structures litigated in federal court — especially since the F.C.C. declined further agency involvement in case-by-case reviews due to the large volume of cases anticipated. It is much more likely that the F.C.C. intended satellite antenna users to avail themselves of existing statutory review processes.

A specific state remedy exists to appeal decisions of local zoning boards in the State of Michigan. This remedy is set forth in Mich. Comp. Laws § 125.585. Satellite antennas are indisputably "structures" within in the scope of Michigan's Zoning Enabling Act, Mich. Comp. Laws § 125.581, *et seq.* The state has delegated the regulation of the height and location of structures to the local government. Local zoning boards are established by the Act to consider variances and appeals from those regulations. State circuit courts have express jurisdiction to review those decisions *de novo.*

Since clear and comprehensive state law remedies exist for this type of land use dispute, the City of Dearborn asserted the affirmative defense that this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 517 (1981) effectively barred a cause of action under 42 U.S.C. § 1983. The district court did not base its summary judgment on *Parratt*, relying instead upon *Johnson*, *supra.*

In *Parratt*, *supra*, the Supreme Court ruled that the existence of an adequate state law remedy to redress property damage or deprivation inflicted under color of state law bars a cause of action under 42 U.S.C. § 1983. As explained above, the State of Michigan sets forth an exhaustive procedure for redress in zoning matters before the state circuit court, Mich. Comp. Laws § 125.

585(11); Mich. Comp. Laws § 125.590. Since adequate state court remedies are available to the Loschiavos, as stated by the City of Dearborn in its original answer to this action, an appropriate cause of action under 42 U.S.C. § 1983 has not been brought before the court according to *Parratt, supra.*

In his closing comments in *Parratt, supra,* now Chief Justice Rehnquist, writing for the majority, shed additional light on this issue:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under color of law into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale, any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states.' *Paul* v. *Davis*, 424 U.S. 693, 701, 47 L. Ed. 2d 405, 96 S.Ct. 1155 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Parratt at 544.

The Loschiavos may argue that *Parratt* should be distinguished because a lost hobby kit, rather than a satellite dish, was at issue. However, the true distinction lies in the fact that in *Parratt* there was some deprivation. Here, the Loschiavos have had the uninterrupted use of their satellite-dish antenna since the day it was installed. In *Parratt*, the Court stated that "in any § 1983

action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Id.* at 553.

The court of appeals did not make this initial inquiry. The Loschiavos do not meet the second element of the inquiry. Therefore, even though they have suffered no deprivation, the court of appeals substantiated their cause of action under 42 U.S.C. § 1983.

Just as Chief Justice Rehnquist feared in *Parratt*, the court of appeals' ruling in the case at hand has paved the way for the federal courts to hear a font of satellite-dish antenna appeals from decisions of local zoning boards.

Justice Marshall observed in a dissenting opinion in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), "Our role is not and should not be to sit as a zoning board of appeals."

It could be argued that the court of appeals' opinion, concluding that a cause of action under 42 U.S.C. § 1983 exists will send such a stern warning to local governments that all ordinances will be hastily reviewed and changed to avoid potential liability. However, due to the unique characteristics of each parcel of land and of off-site obstructions to satellite site lines, it is unlikely that a zoning ordinance can be crafted from which a variance will never be requested. Such cases will then present issues of fact which may be litigated in federal court to determine whether an ordinance unreasonably restricts reception. If a local government is exposed to damages and attorney fees in each case, the legitimate exercise of discretion by local zoning boards will cease to exist. This will result in a carte blanche for satellite antenna users which the F.C.C. declined to provide in 47 C.F.R. § 25.104.

The situation in this case is illustrative. Dearborn's regulation permitted many satellite antennas prior to the institution of this lawsuit. The unique characteristics of the Loschiavo property (large off-site trees across the street and several homes away) were not contemplated by the ordinance.

At a hearing before the zoning board of appeals, the Loschiavos did not attempt to educate the board as to their particular reception problems, other than to say that they were having a problem receiving adequate cable reception. The board did not "summarily" deny their appeal, as the court of appeals stated in its Opinion. Rather, the Loschiavos presented no substantive evidence to warrant granting their appeal. The installer of the Loschiavos' antenna did nothing more than argue with the zoning board that Dearborn's ordinance was preempted by the F.C.C. regulation. The court of appeals has essentially rewarded the Loschiavos for withholding pertinent information from the zoning board.

A regulation to accommodate the Loschiavos' satellite antenna would have to permit a height of 25′ above grade. It is unreasonable for the City of Dearborn to be held liable for this lack of foresight inasmuch as the F.C.C. commented "[i]n addition, receive-only antennas usually do not approach thirty feet in height or diameter." 51 Fed. Reg., *supra*, note 19, 5,522.

Rather than provide a regulation which may, in unforeseeable circumstances, subject a local government to damages and fees pursuant to 42 U.S.C. § 1983 and § 1988, it is more likely that the concerns expressed by Commissioner Mimi Weyforth Dawson, dissenting in part from 47 C.F.R. § 25.104, will come home to roost. Commissioner Dawson noted that the majority's rule created an "enormous loophole . . . since blanket bans against all antennas (or blanket bans which grandfather existing antennas) . . . are entirely permissible under the majority's rule." 51 Fed. Reg., *supra*, at 5,526; Appendix, F-11.

A blanket ban against all antennas may seem more prudent than to try to allow and reasonably regulate these structures. The concern is real when, in a unique case such as this, the court of appeals held that the ordinance "improperly trammel[s] an individual's right to satellite reception." *Loschiavo* at 552; Appendix, A-7.

The court's harsh criticism of Dearborn's ordinance was undeserved. The district court reviewed the City's statement of purpose for the ordinance, as well as the ordinance itself, and found that it had a reasonable and clearly defined health, safety or aesthetic objective. Moreover, the district court, after finding that the ordinance was preempted in this specific case, enjoined enforcement of the ordinance only as to the Loschiavos.

V.

THE DECISION OF THE COURT OF APPEALS HAS RADICALLY ENLARGED THE SCOPE OF 42 U.S.C. § 1983.

The court's decision in this case has radically enlarged the scope of 42 U.S.C. § 1983 such that zoning disputes concerning satellite-dish height and placement state a cause of action pursuant to this statute. It is difficult to imagine that this was the intent of the drafters of this statute. In *Wilson* v. *Garcia*, 471 U.S. 261 (1985), Justice Stevens discussed the motivation for the adoption of 42 U.S.C. § 1983 and its predecessors:

> The specific historical catalyst for the Civil Rights Act of 1871 (the predecessor of § 1983) was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights. See *Briscoe* v. *LaHue* 460 U.S. 325, 336-340 L. Ed. 2d 96, 103 S.Ct. 1108 (1983). The debates on the Act chronicle the alarming insecurity of life, liberty and property in the southern states and the refuge that local authori-

ties extended to the authors of these outrageous incidents:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishings have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress. Cong. Globe, 42d Cong, 1st Sess, 374 (1871). (remarks of Rep. Lowe)

By providing a remedy for the violation of constitutional rights, Congress hoped to restore peace and justice to the region through the subtle power of civil enforcement.

Wilson at 276-277.

The state of affairs that existed at the time 42 U.S.C. § 1983 was enacted demonstrates the type of conduct and deprivation of rights that this statute was intended to address. Justice Powell emphasizes this point of view in his concurring opinion in *Parratt*, *supra*, when he refers to 42 U.S.C. § 1983 as a statute "that already has burst its historical bounds." *Id.* at 554. In a footnote explaining this position further, Justice Powell states the following:

> Section 1983 was enacted in 1871 as one of the statutes intended to implement the Fourteenth Amendment. For many years, it has remained a little used, little known section of the Code. In the past two decades, however, resourceful counsel and receptive courts have extended its reach vastly. The statute with a commendable

> purpose no longer is confined to deprivations of individual rights as intended in 1871. As a result, § 1983 has become a major vehicle for general litigation in the federal courts by individuals and corporations.
>
> Professor Christina Whitman recently has addressed this expansion of § 1983 with a comprehensive assessment of arguable pluses and minuses. See Whitman, Constitutional Torts, 79 Mich. L. Rev. 5 (1980). . . .
>
> The societal costs of using this statute for a purpose never contemplated are high indeed: "First, the existence of the statutory cause of action means that every expansion of constitutional rights (through § 1983) will increase the caseload of already overburdened federal courts. This increase dilutes the ability of federal courts to defend our most significant rights. Second, every (such) expansion . . . displaces state lawmaking authority by divesting decision-making to the federal courts."

Parratt, *supra* note 13, at 554.

The Court of Appeals for the Sixth Circuit has previously held that disputes involving local zoning boards are matters within the jurisdiction of the state courts. *Studen* v. *Beebe*, 588 F.2d 560, 566 (1978), citing *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668 (1976). It has also recognized that "Section 1983 does not create a federal cause for every wrong committed under color of state law." *Studen* at 568. Contrarily, the court's ruling that a cause of action under 42 U.S.C. § 1983 existed in the present case represents an erroneous expansion of this statute that other courts have recognized was not meant to exist.

CONCLUSION

For the reasons stated above, petitioner asks that a writ of certiorari to the Court of Appeals for the Sixth Circuit issue and that the decision of the Court of Appeals for the Sixth Circuit be reversed.

Respectfully submitted,

By: /s/ DEBRA A. WALLING*
CITY OF DEARBORN
CORPORATION COUNSEL
DOUGLAS WEBER
ASSISTANT CORPORATION COUNSEL
13615 Michigan Avenue
Dearborn, Michigan 48126-3586
(313) 943-2035

Counsel for Petitioner

**Counsel of Record*

DATED: December 7, 1994

Supreme Court, U.S.
FILED

941040 DEC 12 1994

No. _____

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

CITY OF DEARBORN,
Petitioner,
v.
RONALD LOSCHIAVO AND DONNA LOSCHIAVO,
his wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

DEBRA A. WALLING
CITY OF DEARBORN CORPORATION COUNSEL
Counsel of Record
13615 Michigan Avenue
Dearborn, Michigan 48126-3586
(313) 943-2035

Counsel for Petitioner

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

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No. _____

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APPENDIX A

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
-Pursuant to Sixth Circuit Rule 24-

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed September 8, 1994)

(RONALD LOSCHIAVO and DONNA LOSCHIAVO, Plaintiffs-Appellants, Cross-Appellees, v. CITY OF DEARBORN, Defendant-Appellee, Cross-Appellant — Nos. 92-1515/1558; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: MARTIN and BOGGS, Circuit Judges; and HULL, District Judge.*

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* **The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.**

BOYCE F. MARTIN, Jr., Circuit Judge.

Maintaining that a Federal Communications Commission regulation creates a private right of action under 42 U.S.C. § 1983, Ronald and Donna Loschiavo appeal from the district court's grant of summary judgment in favor of the City of Dearborn. The City of Dearborn, in turn, cross-appeals the district court's grant of a permanent injunction precluding city enforcement of a zoning ordinance regulating the installation of satellite dish antennas. For the following reasons, we reverse the grant of summary judgment to the City and affirm the district court's entry of a permanent injunction.

I

On October 13, 1990, the Loschiavos installed a receive-only satellite dish antenna in the backyard of their single-family home in Dearborn, Michigan. The antenna is ten feet in diameter and sits atop a twenty-foot mast. Three days later, the Loschiavos received a Notice of Violation for failing to comply with Dearborn Zoning Ordinance No. 81-33, § 501-e, which requires city residents to obtain approval from the Dearborn Zoning Board of Appeals and a permit from the Dearborn Building and Safety Department before installing an antenna whose diameter exceeds three feet. The zoning ordinance also forbids the erection of antennas that are more than eight feet in diameter or more than twelve feet tall. Following a November 28 hearing, the Dearborn Zoning Board of Appeals summarily denied the Loschiavo's application for a variance and ordered the removal of the antenna by December 31.

In response, the Loschiavos filed suit in federal district court, contending that the zoning ordinance violated their rights under the First and Fourteenth Amendments. They also claimed that the ordinance was preempted by a FCC regulation, 47 C.F.R. § 25.104, which prohibits enforcement of local zoning ordinances that unduly interfere with the installation of individual satel-

lite antennas, and asserted a private right of action under 42 U.S.C. § 1983 to enforce the rights conferred by this regulation. The Loschiavos sought a permanent injunction, declaratory judgment, damages, and other relief.

After a hearing on January 9, 1992, the district court found that the zoning ordinance did not deprive the Loschiavos of their constitutional rights under the First and Fourteenth Amendments and concluded that the FCC regulation did not create "enforceable rights, privileges, or immunities within the meaning of § 1983." *Wright* v. *Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423 (1987). Accordingly, the court granted summary judgment in favor of the City on these claims.

The Loschiavos' final claim — that the FCC regulation necessarily preempts the Dearborn zoning ordinance — proceeded to trial before the district court. Following four days of testimony, the district court, in a carefully-reasoned opinion, held that Section 25.104 preempts Dearborn Zoning Ordinance No. 81-33, § 501-e. While acknowledging that the City's ordinance had a "reasonable and clearly defined health, safety or aesthetic objective," 47 C.F.R. § 25.104(a), the court concluded that the zoning provision placed unreasonable restrictions on the installation of antennas, thereby thwarting the Loschiavos' reception of satellite signals. Because such limitations run afoul of Section 25.104's mandate, *see* 47 C.F.R. § 25.104(b) (local regulations cannot "operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas"), the district court enjoined the City from enforcing the ordinance as to the Loschiavos.

II

Asserting a right to enforce the FCC regulation under Section 1983, and to recover damages and attorneys' fees, the Loschiavos now challenge the district court's grant of summary judgment in favor of the

City.[1] This Court reviews a grant of summary judgment *de novo*. *Faughender* v. *City of North Olmsted*, 927 F.2d 909, 911 (6th Cir. 1991). Under Federal Rule of Civil Procedure 56(c), summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. We view all evidence before us in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Section 1983 creates a cause of action against any person who, acting under color of state law, abridges "rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. In *Maine* v. *Thiboutot*, 448 U.S. 1, 6-8 (1980), the Supreme Court recognized that plaintiffs may use Section 1983 to enforce not only constitutional rights, but also those rights defined by federal statutes. As federal regulations have the force of law, they likewise may create enforceable rights. *Wright*, 479 U.S. at 431. Section 1983 is not available, however, "to enforce a violation of a federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of § 1983.'" *Suter* v. *Artist M.*, 112 S. Ct. 1360, 1366 (1992) (quoting *Wright*, 479 U.S. at 423).

Given that neither of the parties have suggested that the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, provides a comprehensive remedial scheme that precludes the possibility of private enforcement, we focus our attention on the second inquiry: does the regulation at issue, Section 25.104, define a right enforceable under Section 1983? Factors that bear on the resolution of this question include: (1) whether the provision was intended to benefit the plaintiff; (2) whether the provi-

---

[1] **The Loschiavos have abandoned their constitutional claims before this Court.**

sion creates a binding obligation on the governmental unit, rather than merely expressing a congressional preference; and (3) whether the interest asserted is sufficiently specific as to be within the competence of the judiciary to enforce. *Wilder* v. *Virginia Hosp. Ass'n.*, 496 U.S. 498, 509 (1990).[2]

Section 25.104 arose out of the Cable Communications Policy Act of 1984. The 1984 Act was passed in part to promote the growth of satellite programming and to facilitate individual reception of unencrypted satellite signals. *See* 130 Cong. Rec. S14285 (1984) (statement of Sen. Packwood), *reprinted in* 1984 U.S.C.C.A.N. 4738, 4745. In view of this goal, Congress amended the Communications Act to authorize the receipt of unscrambled satellite programming for private viewing. While leaving intact the prohibitions against unauthorized use of radio or wire communications contained in 47 U.S.C. § 605(a), the 1984 Act added the following exclusion:

> The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual . . . of any satellite cable programming for private viewing if —
>
> (1) the programming involved is not encrypted; and
>
> (2)(A) a marketing system is not established . . . ; or
>
> (B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming

---

[2] **Although some believe that the Supreme Court's recent opinion in *Suter* superseded the well-established framework set forth in *Wilder*, this Court has joined other Circuits in concluding that the two opinions may be harmonized. *See Wood* v. *Tompkins*, No. 93-3684, 1994 U.S. App. LEXIS 23498, at *17-18 (6th Cir. Aug. 29, 1994) (noting that "the *Suter* majority expressly relied on parts of *Wilder*, carefully distinguished other parts, did not overrule the earlier case, and is entirely consistent with it").**

> ha[ve] obtained authorization for private viewing under the system.

47 U.S.C. § 605(b). "Private viewing" is defined as "viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite." 47 U.S.C. § 605(d)(4).

Shortly thereafter, the FCC, concluding that local regulations regularly interfered with the right recognized by the 1984 Act to receive satellite signals for home viewing, adopted a rule preempting discriminatory local ordinances. In pertinent part, the provision provides:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

47 C.F.R. § 25.104. According to the Loschiavos, this regulation created an enforceable right within the meaning of Section 1983. We therefore turn to the three-part *Wilder* inquiry.

We have no doubt that the Loschiavos, as the owners of a satellite antenna used to receive programming for home viewing, were intended beneficiaries of this regulation. Section 25.104 was adopted to ensure that "the federally guaranteed right of earth station antenna users to receive certain satellite signals for home viewing" would not be impaired. *In the Matter of Preemp-*

tion of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York, 7 F.C.C. Rcd 2172, 2172 [*sic*] (1992), *rev'd on other grounds, Town of Deerfield, New York* v. *FCC*, 992 F.2d 420, 429-30 (2d Cir. 1993). As the FCC recognized in promulgating this regulation, "[i]f individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by Section [605] to interstate communications delivered by satellite will be useless." *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5519, 5522 (1986). Because Section 25.104 seeks to protect individual satellite antenna users from undue interference, we conclude that the regulation was intended to benefit the Loschiavos.

We also find that there is sufficient mandatory language in the FCC's regulation to create a binding obligation on the City of Dearborn. In unequivocal terms, Section 25.104 provides that local regulations such as Dearborn Zoning Ordinance No. 81-33, § 501-e "are preempted" if they unduly limit satellite reception or impose excessive costs on satellite antenna users. 47 C.F.R. § 25.104. While acknowledging that local governments have traditionally maintained a strong interest in zoning matters, the regulation explicitly preempts all zoning ordinances that improperly trammel an individual's right to satellite reception. *Id.*; *compare Howard* v. *City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991) (recognizing that FCC declaratory ruling PRB-1 refused to preempt local regulations, requiring instead only "a reasonable accommodation" between the antenna height desired by amateur radio operators and "the legitimate interests of local governments in regulating local zoning matters"). The mandatory language of Section 25.104 sets forth a clear command: local governments are not to enforce zoning ordinances which impose unreasonable limitations on the use of satellite antennas. *Compare Audette* v. *Sullivan*, 19 F.3d 254, 256

(6th Cir. 1994) (finding no Section 1983 cause of action where Medicaid Act merely gave state actors an "incentive," while placing "onus of compliance" upon federal officials). Given its unambiguous nature, we conclude that Section 25.104 imposes a binding obligation on the City of Dearborn.

We consider, finally, the third prong of the analytical framework established in *Wilder*. Relying in part on *Suter*'s conclusion that the "reasonable efforts" provision of the Adoption Assistance and Child Welfare Act of 1980 did not give rise to a private right of action, the City of Dearborn contends that Section 25.104 fails to define what constitutes an "unreasonable" limitation on the reception of satellite signals, thereby placing the regulation "beyond the competence of the judiciary to enforce." *Wright*, 479 U.S. at 431-32. We disagree. A regulation is not rendered impermissibly vague simply because it calls for a judicial determination of "reasonableness." *See Wilder*, 496 U.S. at 520 (inquiry into reasonableness of Medicaid reimbursement rates is "well within the competence of the judiciary"); *Wright*, 479 U.S. at 432 (interpreting "reasonable" utility allowance). Instead, as the Supreme Court has recognized, courts are competent to interpret each statute or regulation by its own terms, considering the provision "in light of the entire legislative enactment." *Suter*, 112 S. Ct. at 1367 & n. 8. Here, the legislative history of the 1984 Act makes clear that Congress amended Section 605(b) of the Communications Act to promote individual access to diverse satellite programming. To further this goal, the FCC adopted Section 25.104, which provides unambiguous notice to local governments that zoning ordinances cannot frustrate the reception of satellite signals for home viewing. Given the straightforward nature of this provision, particularly when considered in light of the purpose of the 1984 Act, we are confident that the reasonableness standard is readily susceptible of judicial evaluation. *See also Preemption of Local Zoning*, 51

Fed. Reg. at 5524 (FCC considers it "within the ability of a court to make legal determinations of reasonableness or excessiveness").

Because we believe that the Loschiavos are entitled to bring a Section 1983 action against the City of Dearborn to enforce their right to install a receive-only satellite antenna for private viewing of satellite programming, we conclude that the district court erred in granting summary judgment in favor of the City on this claim.

III

On cross-appeal, the City of Dearborn contends that it may enforce against the Loschiavos certain portions of its zoning regulation governing the installation of satellite antennas despite Section 25.104. According to the City, the FCC regulation cannot simply override a local government's strong interest in protecting the safety of its residents and preserving the aesthetic quality of its neighborhoods. The City thus maintains that the district court erred by ruling that Dearborn Zoning Ordinance No. 81-33, § 501-e was preempted in its entirety and in permanently enjoining the City from enforcing it as to the Loschiavos.

Our review of the record does not reveal that the district court based its decision to enter a permanent injunction on erroneous legal conclusions or findings of fact. Nor did the district court abuse its discretion in fashioning the remedy. *See Basicomputer Corp.* v. *Scott*, 973 F.2d 507, 511 (6th Cir. 1992) (district court's decision to issue a preliminary injunction is reviewed for abuse of discretion and "we accept the court's findings of fact unless clearly erroneous"); *see also Crane* v. *Indiana High Sch. Athletic Ass'n*, 975 F.2d 1315, 1326 (7th Cir. 1992) ("Our review of the district court's decision to grant a permanent injunction 'is limited to the determination of whether the district court abused its discretion in deciding that the circumstances of the case justified injunctive relief.'"). Instead, the district court

considered extensive testimony and made specific findings of fact before concluding that, with regard to the installation of a satellite antenna at the Loschiavos' residence, Dearborn Zoning Ordinance § 501-e was necessarily preempted by Section 25.104. We believe that the district court did not abuse its discretion in determining that injunctive relief was warranted and, therefore, affirm the district court's entry of a permanent injunction precluding enforcement of the zoning ordinance against the Loschiavos.

IV

For the foregoing reasons, we reverse the district court's grant of summary judgment in favor of the City of Dearborn with respect to the Loschiavos' right to enforce Section 25.104 under Section 1983, affirm the district court's order of equitable relief, and remand for further proceedings in accordance with this opinion.

JUDGMENT

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the district court's grant of summary judgment in favor of the City of Dearborn with respect to plaintiffs Ronald and Donna Loschiavo's right to enforce Section 25.104 under 42 U.S.C. § 1983 is REVERSED. IT IS FURTHER ORDERED that the district court's order of equitable relief is AFFIRMED. The case is REMANDED for further proceedings in accordance with the opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

(Certification Omitted)

APPENDIX B

ORDER DENYING REHEARING EN BANC

(United States Court of Appeals — Sixth Circuit)

(Filed November 22, 1994)

(RONALD LOSCHIAVO; DONNA LOSCHIAVO, Plaintiffs-Appellants, Cross-Appellees, v. CITY OF DEARBORN, Defendant-Appellee, Cross-Appellant — Nos. 92-1515/1558)

Before: MARTIN and BOGGS, Circuit Judges; and HULL, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

---

* **Hon. Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.**

APPENDIX C

ORDER GRANTING SUMMARY JUDGMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Proceedings of January 9, 1992)

(RONALD LOSCHIAVO, DONNA LOSCHIAVO, Plaintiffs, vs. CITY OF DEARBORN, Defendant — Civil Action No. 90-CV-73794-DT; HON. BERNARD A. FRIEDMAN)

* * *

(3) Detroit, Michigan
Thursday, January 9, 1992
2:30 o'clock p.m.

THE CLERK: Calling case number 90-73794, *Loschiavo* versus *City of Dearborn.*

MR. GRIFFEN: Afternoon, Your Honor. John Griffen appearing on behalf of plaintiffs.

MS. WALLING: Afternoon, Your Honor. Debra Walling on behalf of City of Dearborn.

THE COURT: Okay. We have cross motions so-to-speak for summary judgment. Has there been more discussion in terms of resolving it?

MR. GRIFFEN: None, Your Honor.

THE COURT: I know the Bloomfield Township one was much easier to resolve because we had two or three acres worth of property to move the thing around or and probably a whole lot more money. But I mean, I'm prepared today. We've done a lot of work on the case. I just wish — there's no way we can work this out? The dish has to be that size?

MR. GRIFFEN: Absolutely. I know we've never had any testimony about technology, but it's in the affidavits.

THE COURT: I know.

MR. GRIFFEN: So 10 feet is what you're allowed (4) to have, that's the problem.

MS. WALLING: But, Your Honor, in those affidavits it's 10 feet to access every satellite that's in orbit, whether or not channels are coming through or not.

MR. GRIFFEN: That's not true, Your Honor.

THE COURT: Okay. What you're arguing about right now is apparently some of the factual disputes that exist here and — okay. I just — as I say, I was just hoping this particular one we could — I'm prepared to listen to some arguments and rule on this matter, but just really hoping there was some way of being able to resolve it.

MR. GRIFFEN: I never had a dish that hasn't been resolved and I've had a number of them.

THE COURT: What's the problem here on resolution?

MR. GRIFFEN: Ask the city. They've never talked to me.

MS. WALLING: Well, Your Honor, there's never been any movement from the position that they have to have it that big, and that tall, and that wide.

MR. GRIFFEN: Your Honor, I've offered to have the city come to the house with me, with their experts, if they have one — and they didn't disclose one in this case (5) — and talk about it, to look at it, see if there are alternatives. If there's an alternative, I've always been willing to explore it.

THE COURT: Your expert says there's no alternative?

MR. GRIFFEN: Absolutely none. I've asked him. I've been out with my landscape guy, satellite people, installer, president of Michigan satellite. There is no alternative. That's the problem.

THE COURT: You think there's an alternative?

MS. WALLING: Yes. The plaintiffs admit in their depositions I attached, and also the one affidavit from Mr. Postema, who had very impressive credentials, spoke to the fact that's the size needed to get all the channels. The Loryobos [*sic*] said they considered a smaller dish, but couldn't access every satellite out there. I think there's no room for movement.

THE COURT: Do they have a right to access every satellite?

MR. GRIFFEN: I don't agree with that, but let's even assume they're entitled only to reasonable reception. You have to have a 10 foot diameter or larger dish in order to receive adequate signal, reason being the satellites that are out there in orbit 22,000 miles above the Equator are C band transmissions —

(6) THE COURT: What's reasonable and unreasonable? Who sets the standard?

MR. GRIFFEN: Who sets the standard?

THE COURT: What's reasonable reception?

MR. GRIFFEN: Being able to turn on your television set and see TV. I think reasonable should be equivalent — they claim we can get on cable system, the same you may get at your house or mine, whether it's by cable or over air conventional antennas; that's all we're asking for.

The reason you can't get it with a smaller dish is the dish itself is a collecting device, collects the microwaves from the satellite. C bands are limited in power because it's the same frequency used in long distance telephone lines and the government has limited them. U band, which is used for business or commercial type communication is much higher —

THE COURT: Why is this dish a different size than the one in Bloomfield Township?

MR. GRIFFEN: It isn't. It's the same size.

THE COURT: Same size?

MR. GRIFFEN: Yes. Historically, in Michigan you find 10 foot dishes. It has to be to collect the signal. The signal's not very strong. Think of it geometrically. If you take a 10 foot dish and make it 5 foot, (7) you haven't made the dish signal smaller, but significantly reduced it by 48 percent. If you do mathematics, the — you will not collect sufficient mircrowave [*sic*] signals which are weak as it is in order to turn your TV on and be able to pull in a station without getting snow and everything else. I'll tell you another thing —

THE COURT: Every station or just some?

MR. GRIFFEN: Stations generally. I'm not talking about trying to get some — eke something from the ionosphere nobody else has had before. I'm talking about having reasonable reception.

If you could have a two foot dish and have reasonable reception the people would have them. You can not. The technology is not there. That's the problem.

I'll tell you, the technology — not technology, but the government, the FCC is changing the spacing of the satellites. They used to be four degrees apart in orbit and then reduced to three. Now they're being reduced to two. The problem with that is the larger the dish the more focused or narrow the beam width. The smaller the dish the broader the beam width. The more broader the beam width, if the satellites themselves are closer together, you'll have overlap and interference and be able to turn your TV and, unfortunately, at the same time (8) receive two or three channels and preclude your reception. That's another reason you need 10 foot dishes.

I wouldn't be surprised in the future to see they have to be 12 feet in Michigan in the future. If that's the case I don't know why these other people in Dearborn bought dishes and put them up that are less than 10 feet in diameter.

MS. WALLING: It's not just so much the width of this one, it's that it's on this 20 foot mast and the safety concerns there of, not only the neighbors, but the plaintiffs themselves. I mean, if this thing blows over . . .

MR. GRIFFEN: Your Honor, safety concerns are a bunch of hogwash, and that wasn't anything raised by the Zoning Board of Appeals when they had their hearing before them. Satellite dishes are on towers all the time. You have to have direct -

THE COURT: But they're not on a tower — I don't want to get into this because it's facts — they're not on the tower right next to somebody's house. Ever see —

MR. GRIFFEN: That's not true. They're on towers in mass all over in residential areas. It's perfectly secure.

The city can come out and test it. Their requirement is some wind withstanding that as —

(9) THE COURT: How about if there's an expert that said they could get adequate reception, reasonable reception?

MR. GRIFFEN: The FCC language is "reasonable reception."

THE COURT: Right. That's why I changed it. Says they get reasonable reception by doing it a different way. Would they be willing to do it?

MR. GRIFFEN: There is no such expert. I would certainly be able to explore that. [W]hy hasn't the City disclosed the expert?

THE COURT: The question is yes or no. If an expert comes out and says they get reasonable reception, reasonable reception may not mean they get every single channel, may not be that every single channel they get is 100 percent clear, but they can get at least that which is equivalent to say cable, I think at that time a fair —

MR. GRIFFEN: It's also an antitrust violation. I understand.

THE COURT: It's either yes or no. If that's not a sell that's okay.

MR. GRIFFEN: I've always been acceptable to exploring that.

THE COURT: How about the City? Would that be acceptable to the City?

(10) MS. WALLING: That would be great, but I can't find anybody that's not in the business of putting these things up that even wants to get involved. It's very self-serving.

THE COURT: What about if I could find somebody, and appoint that person and talk about cost? There's some people out there I'm sure — got to be somebody in academia that doesn't do it, but understands what this whole thing is about. There's also some people out there that are electrical engineers and those kinds of persons that do this that really have the expertise and so forth, that have no ax to grind, they don't work for a company.

I'm just thinking, when I was going over this case — I can tell you right now this is my brief and my bench memo on this, so I'm prepared to rule on the case but I just think from a fairness standpoint for the City as well as citizens, there must be some compromise on this whole issue because this is a win all lose all issue for both sides.

It's going to cost lots of money to try this case, and lots of time and effort. And, as I say, I think that there are people out there — and, as I say, I've been thinking about who would be the person, and I agree most of the people that have some ax to grind, installers or building inspectors, whoever, but I thought there must (11) be somebody either in academia — it's also my understanding that some of the large corporations have their own satellite systems and very, very much aware of what's going on up there and what size dishes, including the United States Government has their own satellite systems and pick-up systems. So there's people out there neutral that we could appoint that, if each side agrees that they're going to abide by the technology that — and the standard, the standard isn't every single station, it's one of reasonableness.

MR. GRIFFEN: I've never argued otherwise, Your Honor.

THE COURT: It's up to you too. I'm prepared to rule. It's up to you. Once I rule, it will kill any chance of really resolving this matter, and I don't care. It would be an interesting trial.

As I say, I think I told you last time when we had the township involved I thought the same thing. My understanding they finally resolved it and everybody's happy. I don't know. If neither side's willing, I don't care.

If that makes sense, then why don't we find that person? I'd be more than glad to explore that person and work out an arrangement. Shouldn't be lots of money. Probably less money than would cost to do a lot of other (12) things in this case. Any thoughts?

MS. WALLING: That's great, Your Honor. I mean, I've tried locally at — with local academia and there doesn't really appear to be anyone in the area. Next step would be going to Washington, D.C. Maybe some people that work for the FCC. I've got the name of one person, but he was the brother of an attorney at our office, so . . .

THE COURT: If both sides agree, and they will abide by the technical ruling because I think that's important — technical ruling of this person, I will find somebody for you that's neutral. Obviously we can't bring somebody from Washington. That would cost us just 500 to pay for air fare, but I think we can do it local. Again, I haven't explored it, but can I — is that acceptable to both sides? If it isn't, that's okay. You want time to talk to your clients?

MR. GRIFFEN: No, I've always been more than willing to do that, Your Honor. The only thing I hesitate — or to me it sounds like a binding arbitration proposal. Since I don't know who this person is — I'm absolutely confident, if it's a qualified person, he will agree with my position right down the line and won't have a problem. So that my only hesitation, though, is I don't know who that person is going to be.

To answer your question, yes, I would be happy (13) to have the Court find independent, neutral experts, if you will.

THE COURT: It almost has to be fairly binding because the City takes just the opposite position of you. Is that — you may be right, but they think they're right, but that there must be some other way of doing it that can satisfy this whole scheme of things. I can't tell you the person because I haven't started to look, but it's got to be binding. It doesn't make any sense for us to go through all this.

I would be more than happy to do is try to get as many names as I can and use the striking method, and I'm not sure I can get more than one name of someone truly knowledgeable and independent. There's got to be somebody practical, not somebody again that sits in

academia and never had practical experience. It has to be practical, both from a home owner standpoint as well as a city standpoint, as well as those other things. I think we can find a person.

MS. WALLING: Just a thought, Your Honor. I mean, something I thought of. Another way to approach it, if we have — you're ultimately going to have to decide what's reasonable in terms of how many stations these people can get. We have other residential satellite dishes in the city, and those people can tell us how many (14) stations they're receiving with a smaller dish. That's another way to approach it.

THE COURT: I am prepared to make — after listening to some testimony, the question of reasonableness. That I'm prepared to do. There's no problem. Hopefully the report will come back and say, if you do it this way you get every single station; if you do it this way you get this and this and this; and I can, through very limited testimony, home owners versus the cable company, how many channels they get, what kind of programming do they get and those kinds of things; find out what's reasonable, plus there may be some cases out there in terms of what's reasonable.

Reading what I have read so far, I think the reasonableness standard is easier to do than whether or not technology wise you could even do anything different, as counsel says you can't. If you can't, you can't. But if you can, as I say —

MR. GRIFFEN: Absolutely none of the cases cited — and I every day look to see if there's new additions, something's come down and have found an alternative. Every one of them have found preemption in favor of the home opener [*sic*].

THE COURT: It's up to you. Either say yes or no. If the answer's no, fine, I'm ready to go.

(15) MR. GRIFFEN: No, Your Honor.

THE COURT: No? Okay. Let's go. Let's argue the motions. We have plaintiffs' motion for summary judgment, defendant's motion for summary judgment.

Any matters you want to discuss? I have read the briefs and we've done a lot of work on this case.

MR. GRIFFEN: I was going to say, Your Honor, In preparing for this argument, I've read the briefs again, and I haven't read them since we filed them.

I filed a brief, counsel filed a brief, and we each replied. So, if the Court has read those briefs and the law that's been cited in them, there's absolutely nothing I can add or change to update the brief.

Oh, only thing I would point out in that regards, I think it is absolutely a FCC preemption case. I think the Court can make its ruling based upon the FCC preemption order and not go any further. I think their ordinance does differentiate, contrary to the assertion in the brief, just by looking at the ordinance itself and reading the title of the — that apply, and the fact that they only apply and restrict satellite dish antennas, so there's clearly differentiation. Then I think both of the two prong tests, there are unreasonable limitations and undue cost burdens. So I think that following the law that's cited in the brief and analysis this is definitely (16) a preemption case.

All of the cases cited, and that's all of the cases that I found that discuss this issue, discuss virtually identical provisions in ordinances in New Jersey, New York, Wisconsin, California and Michigan. And every one of them has found preemption, has found the ordinances generally under aesthetic consideration could, if you will, are really geared towards depriving some owners of the right to the satellite reception antenna, the right that the FCC — when it issued its preemption order — was trying to permit or help the home owners be able to do something that the policy of the United States allowed them to do; that is, to receive reception by satellite reception antenna as opposed to any other system they might want to use. Every case found has ruled in favor of home owners, including the Johnson case cited by defendants in support of their briefs.

The only other item was on the issue of attorney fees under 42 U.S.C. Section 1988. The early cases just routinely granted fees under Section 1988 in a preemption case and the issue was never discussed. It ultimately became an issue, apparently in the Johnson case, and also in a case I recently found that is not in anybody's brief.

There's a memorandum decision and order that was issued in the Northern District of New York on December 27th by (17) Chief Judge McKern, and he had decided on summary judgment motion in October of '91 in favor of the plaintiffs on the preemption issue, but had deferred his decision on the attorney fee issue saying "I'm not sure if 42 U.S.C. 1988 or 835 applies when the—" "—when we're dealing with an FCC order or federal regulation."

And he had briefs filed and considered the matter further, and issued his memorandum opinion December 29, which analyzes and is very good discussion of that issue, and he finds that it does apply. And, in fact, in this case has awarded the attorney fees to the Kesslers. In making that decision he relies upon Golden State Transit versus City of Los Angeles, which is U.S. Supreme Court opinion from 1989 —

THE COURT: How does he deal with Johnson? I'll deal — take a look at it.

MR. GRIFFEN: The opinion does not discuss Johnson at all. I've also requested copies of briefs because I wanted to see if either side addressed the Johnson issue. But because I just got this yesterday —

THE COURT: He doesn't address Johnson.

MR. GRIFFEN: Not in the memorandum, but his analysis is very good, and opposite view of Johnson.

I thought this Court, before it rules, ought to at least have the benefit —

(18) THE COURT: I'd like to take a look at it. Do you have a copy?

MR. GRIFFEN: I have an extra copy I will provide to the Court.

THE COURT: I'll take a look at it.

MR. GRIFFEN: Would you like it right now?

THE COURT: Yes, sure, please.

MR. GRIFFEN: I'll also give one to opposing counsel, Your Honor.

THE COURT: Thank you. Appreciate it.

Okay. Anything else?

MR. GRIFFEN: Nothing further, Your Honor.

THE COURT: Any argument?

MS. WALLING: Just a couple comments, Your Honor. Obviously we think our ordinance doesn't discriminate. In fact, I supplied that affidavit that shows the way we enforce the ordinance is not discriminatory.

If you go beyond that and get to the reasonableness two prong test, I'd just like to make a comment that key word "reasonable," you have to look at the community, you know. And when counsel says these cases are identical and the plaintiffs always win, well, none of them are identical with respect to changes from community to community and ordinance to ordinance. And, (19) you now [*sic*], I wish that the FCC would have said, when they imposed these rulings, height, diameter, done whatever they wanted. Instead their footnotes say we wanted to give municipalities some flexibility to control their own communities.

Well, in Dearborn you have — it's an older community. Comparatively, you have smaller lots, older homes, you know. The Loryobos have a 50 foot lot. Theirs is one of the bigger ones. We have lots in Dearborn that start at 30 feet, subdivisions like that. When you look at the size of the lots and the size of the homes, then look to this 12 foot high and 8 foot diameter standard, that is reasonable. Specially when you think about, if these were to fall, and the aesthetics. I mean, there are obvious reasons for 12 feet and 8 feet. And I think you really have to look at the character of Dearborn.

Along those lines, you know, counsel mentioned in his brief — and I have to talk about it a little bit, you know — Dearborn is arrogant in imposing these sorts of

requirements. I want to say that we are far from it, being an older community with small homes and small lots.

The suburbs have plenty of bigger, more modern homes available on larger pieces of property. The things we have to do to keep our residents and track our residents are to protect our quality of life you can have (20) in a community such as Dearborn, and we think that this type of regulation of dishes is reasonable. We allow them, we don't prohibit them, but we don't want them to be unsightly or unsafe.

The last point I'd like to make deal with the rule itself. I realize at the time it was passed satellite dishes were new. You know, the companies were afraid that municipalities were going to keep them out because they were unsightly, or for whatever reason.

I think the rule nas been very effective. Now satellites are everywhere. And the effect has been that the rules have been so effective that it's now obsolete because nobody is building any other kinds of antennas. Nobody's putting up VHF antennas anymore anyway. So, to say that an ordinance shouldn't differentiate between satellites and other antennas is fine. The fact is, nobody's putting any other kind up anyway, so those are the only kind we're talking about these days.

With that, Your Honor, and everything else that's been filed, that's all I have.

THE COURT: Okay. In this matter the law is such that the ordinance is preempted by the FCC regulation, if the city ordinance is shown to differentiate between satellite antennas and others.

The Court in this particular matter believes the (21) Dearborn ordinance does differentiate between antenna types on its face, just even the title. However, once that question is decided, the ordinance must pass a two prong test. And the test, as we all know, is reasonableness, and clearly defined health, safety, aesthetics; that's number one.

2. Limitations must be reasonable and costs not excessive. And, as we've heard here today, there's a big question as to the second part of the test.

I think the first part of the test the Court believes has been met. It's the second part that really is disputeable [*sic*], whether the ordinance as written, whether there's — the costs are excessive in light of the purchase, and installation costs an[d] so forth.

Therefore, as to that portion, both partys' [*sic*] motion for summary judgment is denied as to that issue.

The next issue we have is the 1st Amendment claim.

The Court believes that defendant's motion for summary judgment should be granted and plaintiffs' motion denied.

As to this issue, the Court believes the courts are correct and designed to serve substantial government interest and not unreasonably limit alternative avenues of communication based on the 1st Amendment. It serves (22) substantial government interest. For all those reasons the Court believes the defendant's motion should be granted.

The 14th amendment. In relation to this one, the Court believes the state and local government does have broad authority under their police powers to regulate the uses of private lands. However, it must relate to welfare, safety, health and so forth, and including aesthetics. I think the law's pretty clear as to that, and the Court believes that this particular ordinance complies.

The defendant's motion for summary judgment again should be granted and plaintiffs' denied as to this issue.

The 1983 claim is a bit different, and I've read Judge Kern's [*sic*] decision just now, which is obviously contrary to the Johnson decision. And, again as counsel indicated, he just received it and it's dated very, very recently. He hasn't seen whether or not Judge McKern was aware of the decision in Johnson. But I think the reasoning in Johnson in analyzing this case is what the Court believes the state of the law as it exists today.

The reasoning Johnson, the Court believes, is proper. And, therefore, the Court will adopt the reasoning in Johnson.

(23) The Court in that case held that it was not the intent of legislature, in enacting the statute, to create such a cause of action.

And, also in relation to that particular issue, the Court will grant defendant's motion for summary judgment and deny plaintiffs' motion for summary judgment, realizing that there is a split as to the 1983 claims, but I think that that's the way to go on this particular one.

So we have, basically, one issue left, and that issue is the second part of the two prong test. And I think that's the main issue, listening to arguments here trying to resolve that, probably the main issue we have left in relation to this.

I think we have a trial date coming up fairly quickly, do we not?

MR. GRIFFEN: January 21st.

THE COURT: How does that look? Look good for everybody?

MR. GRIFFEN: The trial date is fine with me. I guess my question is, we also have a final pretrial conference scheduled for the 13th coming up quickly. My only question in that regard, I have not — or have not started to put together a pretrial statement pending the hearing.

THE COURT: I appreciate that.

(24) MR. GRIFFEN: Are we still going to follow that same schedule?

THE COURT: Yes, I just asked to make sure we're on schedule. Looks like we're going to be pretty much on schedule. When you come in on the 13th we'll set an exact date. It should be around the 21st. I think the issues are substantially narrowed down and we'll go from there.

Anything else we should talk about?

MS. WALLING: Thank you.

THE COURT: We'll do the order.

MR. GRIFFEN: Thank you.

APPENDIX D

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

(United States District Court —
Eastern District Of Michigan —
Southern Division)

(Dated February 11, 1992)

(RONALD LOSCHIAVO, DONNA LOSCHIAVO, Plaintiffs, vs. CITY OF DEARBORN, Defendant — Civil Action No. 90-CV-73794-DT; HON.BERNARD A. FRIEDMAN)

This matter is before the court on plaintiffs' motion for reconsideration, filed January 23, 1992. Pursuant to Rule 7.1(e)(2) of the Local Rules of the United States District Court for the Eastern District of Michigan, this motion will be decided without oral hearing.

Plaintiff seeks reconsideration of the court's January 13, 1992, order granting defendant's motion for summary judgment as to Count IV of plaintiff's amended complaint. Count IV sought an award of attorney's fees pursuant to 42 U.S.C. §§ 1983, 1988.

Motions for reconsideration are governed by Local Rule 7.1(h)(3), which provides:

> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, whether expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

Here, plaintiffs have failed to demonstrate "a palpable defect" by which the court has been misled, nor would a different disposition result. Accordingly,

IT IS ORDERED that plaintiffs' motion for reconsideration is denied.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: FEBRUARY 11, 1992
Detroit, Michigan

(Certificate of Mailing Omitted)

APPENDIX E

JUDGMENT AND MEMORANDUM OPINION

JUDGMENT

(United States District Court —
Eastern District Of Michigan —
Southern Division)

(Dated March 17, 1992)

(RONALD LOSCHIAVO, DONNA LOSCHIAVO, Plaintiff, vs. CITY OF DEARBORN, Defendant — Case No. 90-CV-73794-DT; Honorable Bernard A. Friedman)

In accordance with the findings of fact and conclusions of law submitted in this matter in a Memorandum Opinion dated March 17, 1992, pursuant to Fed. R. Civ. P. 52,

IT IS ORDERED AND ADJUDGED that judgment be and hereby is, entered in favor of plaintiffs and against defendant. Costs to be allowed as permitted by law.

Dated at Detroit, Michigan, March 17, 1992.

/s/ JOHN P. MAYER
CLERK OF THE COURT

By: /s/ [*Illegible*]
Deputy Clerk

Approved:
/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

In this civil action, plaintiffs seek declaratory and injunctive relief to prevent the defendant city from enforcing its ordinance that prohibits satellite dishes

wider than eight feet in diameter and mounted higher than twelve feet. Plaintiffs assert that the ordinance is preempted by Federal Communications Commission regulations[1] because the ordinance unreasonably limits reception and imposes excessive costs upon the users.

The case was tried by the court. After consideration of all the testimony and exhibits received into evidence, the court makes the following findings of fact and conclusions of law, as required by Fed. R. Civ. P. 52.

Background

Plaintiffs Ronald and Donna Loschiavo own a single family residence in Dearborn. On October 13, 1990, they installed a satellite dish in their backyard. The dish is ten feet in diameter and is mounted on a twenty-foot mast. Three days later they received a Notice of Violation for failure to comply with Dearborn Zoning Ordinance No. 81-33, § 501-e *et seq.* The ordinance requires that anyone installing a satellite dish antenna that exceeds three feet in diameter must first obtain approval from the Dearborn Zoning Board of Appeals and a permit to erect an antenna from the Dearborn Building and Safety Department. The ordinance forbids dishes in excess of eight feet in width and twelve feet in height.

Subsequently, plaintiffs applied to the Zoning Board for approval of their satellite dish antenna. At the November 28, 1990, hearing, the Board denied plaintiffs' application. Plaintiffs were ordered to remove their antenna by December 31, 1990. Plaintiffs refused to remove the antenna and filed this suit.[2] They seek declaratory and injunctive relief to prevent the city

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1 **47 C.F.R. § 25.101, *et seq.***

2 **The court granted summary judgment in favor of defendant on plaintiffs' claims under 42 U.S.C. § 1983, based on alleged violations of plaintiffs' rights under the first and fourteenth amendments to the United States Constitution.**

from enforcing the ordinance. They claim that an FCC regulation preempts the ordinance and prohibits its enforcement.

Plaintiffs' claim is based on 47 C.F.R. § 25.104, which provides in part:

> State and local zoning or other restrictions that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective, and
>
> (b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation costs of the equipment.

As a threshold issue, then, the regulation will preempt an ordinance only if it differentiates between satellite receive-only antenna and other types of antenna facilities. Once such differentiation is shown, then the ordinance survives only by meeting both prongs (a) and (b) above. In denying defendant's motion for summary judgment on this issue, the court found that the threshold was met, making it necessary to consider both parts of the test. The court also found that the ordinance has a reasonable and clearly defined health, safety or aesthetic objective, sufficient to meet the first part of the test. However, the court found that a question of fact remained as to whether the second prong was met. The trial focused on this question.

Findings of Fact and Conclusions of Law

Subsection (b) of the regulation can be broken down into three parts: 1) an ordinance may not impose unrea-

sonable restrictions on reception; 2) an ordinance may not prevent reception; and 3) an ordinance may not impose excessive costs upon users. The Dearborn ordinance forbids dishes in excess of eight feet in width and twelve feet in height. While it permits the Board of Zoning Appeals to authorize additional uses if they are "in harmony with the character of the district,"[3] the ordinance contains no express provisions for variances where houses, garages, trees, fences, etc., block the sight lines necessary for satellite transmission. Plaintiffs claim that this violates the first requirement of subsection (b) because it imposes unreasonable restrictions on reception.

Defendant erected a satellite dish that complies with the ordinance (the "Caverne dish") on the lot adjacent to plaintiffs' lot, in an effort to show that such a dish could receive substantially the same programming as plaintiffs' dish.[4] The testimony revealed that the Caverne dish receives signals from seventeen satellites, but not the F-1 signal because it is blocked by trees to the west. The court had an opportunity to view reception on this dish and plaintiffs' dish on February 14, 1992, and found that reception on the two dishes was substantially the same. However, defendant's own witness, Tom Lovachis, who installed the Caverne dish, testified at trial that during the spring and summer months when more leaves are on the trees, reception on the Caverne dish would be blocked for all but the far southeastern satellites. Mr. Lovachis stated that his crew initially walked off the job because it was his recommendation that, given the city's restrictions, the system should not be installed. He testified: "I don't believe there's going to be much reception there at all." Mr.

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3 §§ 203.6, 203.7.

4 The Caverne dish is 7.5 feet in diameter and twelve feet above grade and complies with the Dearborn ordinance.

Lovachis also testified that a dish in compliance with the ordinance anywhere on plaintiffs' property would receive no reception "virtually at all in eight months out of the year."

Based on this testimony, the court finds that the ordinance unreasonably restricts reception in violation of the FCC regulation because it contains no express provision for variances for dishes on property where the satellite sight lines are blocked. The provision allowing additional uses where they are "in harmony with the character of the district" is inadequate because it balances aesthetic concerns with the right to reception. While the city's aesthetic concerns are legitimate and plaintiffs' satellite dish definitely could be considered aesthetically displeasing, this court is bound by the legislative intent of the FCC to forbid unreasonable restrictions on reception. The court cannot balance this intent with aesthetic concerns. The regulation absolutely entitles plaintiffs to be free of unreasonable restrictions on reception. Although the ordinance may be valid as to properties on the south side of the city, where sight lines to satellites are direct, nowhere on plaintiffs' property could they erect a dish in compliance with the ordinance and receive reasonable reception. Therefore, the ordinance is pre-empted by the regulation and is unenforceable, as applied to this case and generally, unless the city makes provisions to accommodate situations where surrounding structures make it impossible to erect a dish that complies with the ordinance and receives reasonable reception.

Conclusion

Because the Dearborn ordinance effectively forbids plaintiffs from having a satellite dish that receives reasonable reception, the ordinance is preempted by the FCC regulation and defendant shall be enjoined from

enforcing it as to plaintiffs. Accordingly, judgment shall be granted for plaintiffs.

/s/ BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: MARCH 17, 1992
Detroit, Michigan

(Certificate of Mailing Omitted)

APPENDIX F

FEDERAL AND STATE STATUTES INVOLVED

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42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

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42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and

changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330.

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47 U.S.C. § 605

§ 605. Unauthorized publication or use of communications

(*a*) Practices prohibited

Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent

jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

(*b*) Exceptions

The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if —

(1) the programming involved is not encrypted; and

(2)(A) a marketing system is not established under which —

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

(c) Scrambling of Public Broadcasting Service programming

No person shall encrypt or continue to encrypt satellite deliveree programs included in the National Program Service of the Public Broadcasting Service and intended for public viewing by retransmission by television broadcast stations; except that as long as at least one unencrypted satellite transmission of any program subject to this subsection is provided, this subsection shall not prohibit additional encrypted satellite transmissions of the same program.

(d) Definitions

For purposes of this section —

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified

or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite;

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use; and

(6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (d)[1] of this section shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

(*e*) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages; regulation by State and local authorities

(1) Any person who willfully violates subsection (a) of this section shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) of this section willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or

imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than $100,000 or imprisoned for not more than 5 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of subsection (d)[1] of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court —

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the

elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $ 1,000 or more than $ 10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $ 10,000, or more than $ 100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $ 100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $ 250.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or is intended for any other activity prohibited by subsection (a) of this section,

shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established heroin as it applies to each such device shall be deemed a separate violation.

(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this subchapter.

(6) Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a) of this section.

(*f*)[2] Rights, obligations, and liabilities under other laws unaffected

Nothing in this section shall affect any right, obligation, or liability under Title 17, any rule, regulation, or order thereunder, or any other applicable Federal, State or local law.

(*f*)[2] Universal encryption standard

Within 6 months after November 16, 1988, the Federal Communications Commission shall initiate an inquiry concerning the need for a universal encryption standard that permits decryption of satellite cable programming intended for private viewing. In conducting such inquiry, the Commission shall take into account —

(1) consumer costs and benefits of any such standard, including consumer investment in equipment in operation;

(2) incorporation of technological enhancements, including advanced television formats;

(3) whether any such standard would effectively prevent present and future unauthorized decryption of satellite cable, programming;

(4) the costs and benefits of any such standard on other authorized users of encrypted satellite cable programming, including cable systems and satellite master antenna television systems;

(5) the effect of any such standard on competition in the manufacture of decryption equipment; and

(6) the impact of the time delay associated with the Commission procedures necessary for establishment of such standards.

(g) Rulemaking for encryption standard

If the Commission finds, based on the information gathered from the inquiry required by subsection (f) of this section, that a universal encryption standard is necessary and in the public interest, the Commission shall initiate a rulemaking to establish such a standard.

(June 19, 1934, c. 652, Title VII, § 705, formerly Title VI, § 605, 48 Stat. 1103; June 19, 1968, Pub. L. 90-351, Title III, § 803, 82 Stat. 223; Sept. 13, 1982, Pub. L. 97-259, Title I, § 126, 96 Stat. 1099; renumbered and amended Oct. 30, 1984, Pub. L. 98-549, §§ 5(a), 6(a), 98 Stat. 2802, 2804; Nov. 7, 1988, Pub. L. 100-626, § 11, 102 Stat. 3211; Nov. 16, 1988, Pub.L. 100-667, Title II, §§ 204, 205, 102 Stat. 3958, 3959.)

TERMINATION OF SUBSECTIONS (f) AND (g)

Section 207 of Pub. L. 100-667 terminated subsecs. (f) and (g), effective Dec. 31, 1994. See Effective and Termination Dates note set out under section 119 of Title 17, Copyrights.

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1 **So in original. Probably should be "subsection (e)".**

2 **So in original. There are two subsections designated (f).**

47 C.F.R. § 25.104

PART 25 — [AMENDED]

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations, Part 25) is amended as follows:

1. The authority citation for Part 25 continues to read as follows:

> *Authority:* Sections 25.101 to 25.531 issued under sec. 4.48 Stat. 1066, as amended: 47 U.S.C. 54. Interpret or apply Secs. 101-104, 76 Stat. 419-427; 47 U.S.C. 701-744.

2. By adding new § 25.104 as follows:

§ 25.104 Preemption of local zoning of earth stations.

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:

(a) Have a reasonable and clearly defined health, safety or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safely regulation is not preempted.

Statement of Commissioner Mimi Weyforth Dawson Dissenting in Part

Re: Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations. CC Docket 85-87.

If this decision were consistent with the press reports of it, I might be inclined to support it.[1] Unfortunately, since I cannot support the Commission's blessing of either blanket bans against all communications antennas or local ordinances which allow discrimination *in effect* against satellite antennas [TVROs], I must dissent in part.

A careful reading of the rule adopted by this decision reveals Just how narrow the Commission's preemption is. The rule adopted by the majority essentially divides local ordinances into two categories: (1) Those local ordinances which "differentiate between . . . [TVRO] antennas and other types of antenna facilities"[2]; and (2) those which do not "differentiate". This latter group falls entirely outside the majority's rule and, thus, is not preempted or otherwise affected by the rule.

However, this dichotomy creates — and seems intended to create — an enormous loophole which I cannot support. First, since blanket bans against *all* antennas (or blanket bans which grandfather existing antennas) do not "differentiate" among types of antennas, they are entirely permissible under the majority's rule. And this ability to ban all antennas rests with the local authority whether or not the ban involves some nationally registered historic district since the

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1 For example, the Associated Press reported that "[t]he only way local zoning authorities can ban the use of backyard or rooftop satellite TV receiving dishes is by showing they violate a 'reasonable and clearly defined health, safety or aesthetic' consideration". As shown above, this is clearly incorrect. Similarly, it is incorrect to say, as reported by the *New York Times*, that in order to be valid "zoning regulations limiting homeowners' right to install [TVRO] antennas 'must have a reasonable and clearly defined' health, safety or aesthetic objective."

2 Even those ordinances which *do* discriminate are not necessarily prohibited. The rule allows discriminatory ordinances as long as they "have a reasonable and clearly defined health, safety or aesthetic objective" and do not "impose unreasonable limitations on, or prevent" TVROs or impose "excessive costs" of TVROs.

majority's rule simply suggests no different treatment for historic districts.

Moreover, the majority's reading of "differentiate" allows numerous rules which *have the effect* of discriminating against TVROs. For example, the majority seems to include within the definition of "differentiate" only those ordinances which separate TVROs by name or those which identify some "shape" characteristic unique to TVROs (as an ordinance which prohibits spherical antennas). Other ordinances — even if they have the *effect* of discriminating against TVROs — do not come within the ambit of the majority's rule and, thus, are not preempted by the Commission.

Such ordinances are not difficult to imagine. For example, a city ordinance might prohibit all antennas over eight feet tall or might prohibit all antennas which are more than 20 feet high and more than three feet wide. Neither ordinance, in the majority's view, would "differentiate" between TVROs and other antennas because neither would single out TVROs by name or "shape". But each would have the *effect* of prohibiting satellite antennas.

I cannot support such a local blanket veto power over interstate communications. In 1984 Congress amended the Communications Act to recognize the legal right (with certain enumerated exceptions) of individuals to intercept and receive "any satellite cable programming for private viewing". 47 U.S.C. Sec. 705. By allowing localities to prohibit satellite antennas as part of a blanket ban or as the effect of some "non-discriminatory" ordinance, I think we do great damage to that Congressional goal.

In addition this decision is wholly inconsistent with the Commission's recently announced policy with regard to SMATV and amateur antennas. In its SMATV decision, the Commission explicitly stated that local regulation could not "inhibit or interfere with the

delivery of interstate [SMATV] signals" and that local regulation could not discriminate *in fact* or be "undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective". *Earth Satellite Communications, Inc.*, 95 F.C.C. 2d 1223 (1983).[3]

Likewise, in its amateur antenna decision, the Commission clearly and unequivocally said that "[s]tate and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." *Federal Preemption of State and Local Regulations*. And the Commission stated that "local regulations which involve placement screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose." *Id.* It is difficult to square these policies with a TVRO rule which allows localities to prohibit satellite antennas.

Finally, I simply cannot understand this decision in its attempt to reconcile these various pronouncements by stating the objective "to ensure that satellite receiving antennas are not treated less favorably than other antenna devices such as Satellite Master Antenna System (SMATVs) and Amateur Radio antennas." *Decision* at para. 33 (footnote omitted). How can this be the case if on the one hand localities are prohibited from banning amateur and SMATV antennas but may ban TVROs (and broadcast antennas for that matter)?

I would be less concerned about this had the discussion at the Commission meeting produced a consistent well-reasoned explanation for these obvious conflicts.

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3 On reconsideration the Commission declined to go further and preempt all local zoning regulation by noting that that "is not appropriate for discussion here" and that the "scope of the initial proceeding did not include review of this issue." Slip Op. at para. 6.

But what I fear that we have done is leave the area hopelessly confused. Indeed, I am unable to read this language and discover whether the Commission intended to conform the TVRO decision to its previous decisions or, as seems more likely, to conform its previous decisions to the TVRO decision — without the requisite record or notice for doing so.

While I am sympathetic to localities' traditional role in use planning,[4] this is not a purely local issue. It involves the right of individuals, as guaranteed by the First Amendment and the Communications Act, to receive interstate communications. As Senator Goldwater said in introducing S.R. 35,

> as a political conservative, I believe that each State possesses broad authority and responsibility on a wide range of subjects. However, the basic question here is not Federal preemption of local powers. It is whether cities and counties can thwart a clear national policy which has been repeatedly enunciated by the Congress and the FCC to encourage the development of new communications technologies and services in the public interest.
>
> 131 Cong. Rec. 5357 (January 3, 1985, statement of Sen. Goldwater).

Accordingly, insofar as the majority's decision allows localities to ban all antennas or to discriminate against TVROs in effect, I dissent.

[FR Doc. 86-3258 Filed 12-13-86; 8:45 am]

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4 Requiring a TVRO to be securely fastened or requiring that it be as unobtrusive as practicable would, as far as I am concerned, be reasonable local regulation and would comport with states' traditional police power. However, I cannot agree that this power to regulate includes the power to prohibit. In addition, it seems possible that, to accommodate the competing federal policies of fostering interstate communications and preserving historic areas, the Commission could adopt a liberal waiver policy or even an exemption for areas covered by the national Historic Preservation Act. 16 U.S.C. Secs. 470, *et seq.*

MICH. COMP. LAWS § 125.581

P.A.1921, No. 207, Imd. Eff. May 17

AN ACT to provide for the establishment in cities and villages of districts or zones within which the use of land and structures, the height, the area, the size, and location of buildings may be regulated by ordinance, and within which districts regulations shall be established for the light and ventilation of those buildings, and within which districts or zones the density of population may be regulated by ordinance; to designate the use of certain state licensed residential facilities; to provide by ordinance for the acquisition by purchase, condemnation, or otherwise of private property which does not conform to the regulations and restrictions of the various zones or districts provided; to provide for the administering of this act; to provide for amendments, supplements, or changes hereto; to provide for conflict with the state housing code or other acts, ordinances, or regulations; and to provide penalties for the violation of the terms of this act. Amended by P.A.1947, No. 272, Eff. Oct. 11; P.A.1976, No. 396, § 1, Eff. March 31, 1977.

The People of the State of Michigan enact:

125.581. Regulation and restriction of use of land and structures

Sec. 1 (1) The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other

public service and facility needs; and to promote public health, safety, and welfare, and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section. For each of those districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades, industries, and other land uses or activities that shall be permitted or excluded or subjected to special regulations.

(2) The land development regulations and districts authorized by this act shall be made in accordance with a plan designed to promote and accomplish the objectives of this act.

MICH. COMP. LAWS § 125.585

125.585. Board of appeals; appointment; duties, procedure; appeals; remuneration; finality of decision: judicial review

Sec. 5. (1) The legislative body of a city or village may act as a board of appeals upon questions arising under a zoning ordinance. The legislative body may establish rules to govern its procedure as a board of appeals. In the alternative, if the legislative body of a city or village desires, the legislative body may appoint a board of appeals consisting of not less than 5 members, each to be appointed for a term of 3 years. Appointments of the first members shall be for terms of 1, 2, and 3 years, respectively, so as nearly as possible to provide for the appointment of an equal number of members each year. After the initial appointments, each member shall hold office for the full 3-year term.

(2) In accord with procedures specified in the zoning ordinance, the legislative body of a city or village may appoint not more than 2 alternate members for the same term as regular members of the board of appeals.

The alternate members may be called on a rotating basis as specified in the zoning ordinance to sit as regular members of the board of appeals in the absence of a regular member. An alternate member may also be called to serve in the place of a regular member for the purpose of reaching a decision on a case in which the regular member has abstained for reasons of conflict of interest. The alternate member having been appointed shall serve in the case until a final decision has been made. The alternate member shall have the same voting rights as a regular member of the board of appeals.

(3) The board of appeals shall hear and decide appeals from and review any order, requirements, decision, or determination made by an administrative official or body charged with the enforcement of an ordinance adopted under this act. The board of appeals shall also hear and decide matters referred to the board or upon which the board is required to pass under an ordinance of the legislative body adopted under this act. For special land use and planned unit development decisions, an appeal may be taken to the board of appeals only if provided for in the zoning ordinance.

(4) In a city or village having a population of less than 1,000,000, the concurring vote of a majority of the members of the board shall be necessary to reverse an order, requirement, decision, or determination of an administrative official or body, or to decide in favor of the applicant a matter upon which the board is required to pass under an ordinance, or to effect a variation in an ordinance except that a concurring vote of ⅔ of the members of the board shall be necessary to grant a variance from uses of land permitted in an ordinance. In a city having a population of 1,000,000 or more, the concurring vote of ⅔ of the members of the board shall be necessary to reverse an order, requirement decision, or determination of an administrative official or body, or to decide in favor of the applicant a matter upon which the board is required to pass

under an ordinance, or to effect a variation in an ordinance.

(5) An appeal may be taken by a person aggrieved, or by an officer, department, board, or bureau of the city or village. If a city or village has created or may create a board of rules or board of building appeals, that board may be enlarged to consist of not less than 5 members, and these may be appointed as the board of appeals as provided in this section.

(6) An appeal under this section shall be taken, within a time prescribed by the board of appeals by general rule, by the filing with the officer or body from whom the appeal is taken and with the board of appeals of a notice of appeal specifying the grounds for the appeal. The officer or body from whom the appeal is taken shall immediately transmit to the board all the papers constituting the record upon which the action appealed from was taken.

(7) An appeal under this section stays all proceedings in furtherance of the action appealed from unless the officer or body from whom the appeal is taken certifies to the board of appeals, after the notice of appeal is filed, that by reason of facts stated in the certificate, a stay would in the opinion of the officer or body cause imminent peril to life or property, in which case the proceedings shall not be stayed otherwise than by a restraining order which may be granted by the board of appeals or by the circuit court, on application, on notice to the officer or body from whom the appeal is taken and on due cause shown.

(8) The board of appeals shall fix a reasonable time for the hearing of the appeal and give due notice of the appeal to the persons to whom real property within 300 feet of the premises in question is assessed, and to the occupants of single and 2-family dwellings within 300 feet, the notice to be delivered personally or by mail addressed to the respective owners and tenants at the

address given in the last assessment roll. The board of appeals shall decide the appeal within a reasonable time. If the tenant's name is not known, the term occupant may be used. Upon the hearing, a party may appear in person or by agent or by attorney.

(9) The board of appeals may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from and shall make an order, requirement, decision, or determination as in the board's opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from whom the appeal is taken. If there are practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the ordinance, the board of appeals may in passing upon appeals vary or modify any of its rules or provisions relating to the construction, or structural changes in, equipment, or alteration of buildings or structures, or the use of land, buildings, or structures, so that the spirit of the ordinance shall be observed, public safety secured, and substantial justice done.

(10) The board of appeals may impose conditions upon an affirmative decision, as provided in section 4c(2).[1] The legislative body of any city or village may authorize the remuneration of the members of the board for attendance at each meeting.

(11) The decision of the board of appeals shall be final. However, a person having an interest affected by the zoning ordinance may appeal to the circuit court. Upon appeal, the circuit court shall review the record and decision of the board of appeals to insure that the decision meets all of the following:

(a) Complies with the constitution and laws of this state.

(b) Is based upon proper procedure.

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1 Section 125.584c(2).

(c) Is supported by competent, material, and substantial evidence on the record.

(d) Represents the reasonable exercise of discretion granted by law to the board of appeals.

(12) If the court finds the record of the board of appeals inadequate to make the review required by this section, or that additional evidence exists which is material and with good reason was not presented to the board of appeals, the court shall order further proceedings before the board of appeals on conditions which the court considers proper. The board of appeals may modify its findings and decision as a result of the new proceedings, or may affirm the original decision. The supplementary record and decision shall be filed with the court.

(13) As a result of the review required by this section, the court may affirm, reverse, or modify the decision of the board of appeals.

Amended by P.A.1986, No. 191, § 1, Imd. Eff. July 8.

MICH. COMP. LAWS § 125.590

125.590. Review by circuit courts; appeals to supreme court; procedure

Sec. 10. Any party aggrieved by any order, determination or decision of any officer, agency, board, commission, board of appeals, or the legislative body of any city or village, made pursuant to the provisions of section 3a of this act[1] may obtain a review thereof both on the facts and the law, in the circuit court for the county wherein the property involved or some part thereof, is situated: Provided, That application is made to the court within 30 days after delivery of a copy of such order, determination or decision, by certiorari or by any

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1 Section 125.583a.

other method permissible under the rules and practices of the circuit courts of this state. On such review the courts shall have jurisdiction to make such further orders in respect thereto as justice may require. An appeal may be had from the decision of any circuit court or condemnation court to the supreme court in the same manner as provided by the laws of this state with respect to appeals from circuit courts; and in the event of such appeal, the issue of non-conformity may be reviewed as an issue of law in the supreme court.

CITY OF DEARBORN ZONING ORDINANCE
No. 81-33, § 501-e

501-e DISH-TYPE SATELLITE SIGNAL-RECEIVING ANTENNAS:

1. "Dish-type Satellite Signal-Receiving Antennas," also referred to as "earth stations" or "ground stations" shall mean one, or a combination of two or more of the following:

a. A signal-receiving device (antenna, dish antenna, or dish-type antenna), the purpose of which is to receive communication or other signals from satellites in earth orbit and other extraterrestrial sources.

b. A low-noise amplifier (LNA) which is situated at the focal point of the receiving component and the purpose of which is to magnify, store, transfer and/or transmit electronic or light signals.

c. A coaxial cable the purpose of which is to carry or transmit said signals to a receiver.

2. "Receiver" shall mean a television set or radio receiver.

3. "Dish" shall mean that part of a satellite signal receiving antenna characteristically shaped like a saucer or dish, being larger than three feet in diameter.

This ordinance shall not apply to earth stations with a dish diameter three feet or less.

4. "Grounding rod" shall mean a metal pole permanently positioned in the earth to serve as an electrical conductor through which electrical current may safely pass and dissipate.

501-e.101 PERMIT REQUIRED

No person, firm, partnership, corporation, trust or other legal entity shall construct an earth station larger than three feet in diameter without approval of the Zoning Board of Appeals and obtaining a permit from the Dearborn Building & Safety Department. No contruction [*sic*] shall commence before a permit is issued in accordance with Section 203 of the Fee Ordinance known as City of Dearborn Ordinance 88-425. Nor shall a person, firm, partnership, corporation trust or other legal entity operate a temporary or portable earth station without first obtaining a permit from the City of Dearborn Building & Safety Department.

501-e.102 APPLICATION FOR PERMIT

Any person who desires to construct an earth station having a dish diameter larger than 3 feet on any lot, premises or land parcel located in the City of Dearborn must appear before the Zoning Board of Appeals who must approve the location and size of the earth station and must first obtain a permit to erect the earth station from the City of Dearborn Building & Safety Department. The person seeking the permit must provide evidence to the Building & Safety Department that the owner of the lot, premises or land parcel where the earth station is to be located has no objection to its construction and is willing to assume all liability of its construction, operation and use.

The Building Department shall issue such permit provided the applicant has Zoning Board approval and submits a written application upon forms provided and

approved by the Building & Safety Department, along with a plot plan of the lot, premises or land parcel attached, showing the exact location and dimensions of the proposed earth station; a description of the kind of earth station proposed; the exact location and dimensions of all buildings or structures; construction plans and specifications prepared by a professional engineer or other qualified technical personnel showing the elevations of the proposed earth station upon completion; and a structural engineering analysis. Each application shall specify among other things the name and address of the owner of the real estate; the applicant and his/her relationship to the owner; the professional engineer, or other qualified technician, who prepared the construction plans and specifications; and the person to be permitted to construct the proposed earth station.

The applicant shall present documentation of the possession of any license or permit required by any federal, state or local agency pertaining to the ownership, construction or operation of an earth station.

The applicant must comply with the provisions of Ordinance No. 88-425 which is the Fee Ordinance of the City of Dearborn. The permit fee shall cover the costs of reviewing the construction plans and specifications, inspecting the final construction and processing the application.

501-e.103 LOCATION OF EARTH STATION

1. Ground-mounted

    a. No earth station shall be constructed in any front or side yard. All earth stations must be constructed to the rear of the residence or main structure.

    b. No earth station, including its concrete base slab or other substructure, including the dish itself, shall be constructed less than five (5) feet from any property line or easement.

c. No earth station shall be constructed without appropriate evergreen landscaping, or other approved method of screening, to reasonably conceal said earth station from view.

d. No earth station shall be linked, physically or electronically, to a receiver which is not located on the same lot, premises or parcel of land as is the earth station.

e. An earth station shall not exceed a grade height of twelve (12) feet or a dish diameter of 8 feet.

f. All structural supports shall be of galvanized metal.

g. Wiring between an earth station and a receiver shall be placed at least four (4) inches beneath the surface of the ground in compliance with the National Electric Code.

h. Such earth station shall be designed to withstand a wind force of one hundred (100) miles per hour without the use of supporting guy wires.

i. Any driving motor shall be limited to 110V maximum power design and be encased in protective guards.

j. An earth station must be bonded to a grounding rod.

2. Roof-mounted

a. Any person seeking a roof mounted earth station must establish, by conclusive, objective evidence, they are unable to locate the earth station anywhere else on the property in question. The Zoning Board of Appeals, in making their decision to grant or deny the request for a roof mounted antenna, must consider the following factors:

(1) The safety of the property owner and surrounding property owners in allowing a roof mounted earth station.

(2) The aesthetic impact of the roof mounted earth station on the surrounding neighborhood and the comments of the neighborhood and the comments of the neighbors in this regard.

(3) Safety of the surrounding property owners and the aesthetic impact of the roof mounted earth station shall outweigh any increased cost to the applicant in locating the earth station on the ground as opposed to the roof.

(4) If a roof mounted antenna is permitted, it shall perferably [*sic*] be located on a garage or other accessory structure, or as a poledown mount, as opposed to the roof of a residential dwelling.

b. The intent of this ordinance is to ensure the safety and welfare of the surrounding property owners and aesthetic factors associated with roof mounted earth stations. Those parties granted (permission to erect) roof mounted stations must comply with the installation and limitations described in Sections c through h.

c. Earth stations shall be mounted directly upon the roof of a primary or accessory structure, as defined in the Building Code, and shall not be mounted upon appurtenances such as chimneys, towers, trees, or spires.

d. An earth station shall not exceed beyond the highest point of the ridge line of the roof it is mounted on. On structures with a flat

roof, it shall not exceed a total height of fifteen (15) feet above the surface of the roof.

e. An earth station "dish" shall not exceed eight (8) feet in diameter.

f. An earth station shall be designed to withstand a wind force of one hundred miles per hour without the use of supporting guy wires.

g. Any driving motor shall be limited to 110V maximum power design and be encased in protective guards.

h. An earth station must be bonded to a grounding rod.

501-e.104 TEMPORARY OR PORTABLE EARTH STATIONS

Temporary or portable earth stations are not permitted in any residential zoning district. Temporary or portable earth stations are permitted to be used in commercial zoning districts for a period not to exceed 48 hours. Prior to their use, a permit must be obtained from the Dearborn Building & Safety Department. Temporary or portable earth stations must comply with the applicable provisions a-h as listed under Roof Mounted Earth Stations.

501-e. 105 SEVERABILITY

Should any section of this Ordinance be declared unconstitutional, such declaration shall not affect the validity of the remaining sections of the Ordinance.

501-e.106 SIGNAGE OR ADVERTISING

No person shall be permitted to use any part of the earth station for advertising or signage purposes.

501-e.107 PENALTY

The penalty for violating of this ordinance shall be a fine of not less than Twenty-five nor more than Five

Hundred Dollars, or imprisonment not to exceed ninety days, or both fine and imprisonment. Each day that a violation shall be permitted to exist shall constitute a separate offense.

501-e.108 APPEALS

Appeals from decisions of the Department of Building & Safety shall be made to the Zoning Board of Appeals as provided by the Codified Ordinance of the City of Dearborn, Michigan.

501-e.109

Council finds and determines that all formal actions and deliberations of this Council pertaining to the adoption of this ordinance have occurred at meetings open to the public in compliance with the Charter of the City of Dearborn, Michigan and applicable state laws.

501-e.110

This Ordinance shall be in full force and effect from and after its passage, approval by the Mayor, and the earliest period allowed by law.

APPENDIX G

DECLARATORY RULING

-50 FR 38813 printed in FULL format-

(Federal Communications Commission Agency:
Federal Communications Commission)

(September 25, 1985)

47 CFR Part 97
Federal Preemption of State and Local Regulations
Pertaining to Amateur Radio Facilities
[PRB-1; FCC 85-506] 50 FR 38813

ACTION: Declaratory ruling.

SUMMARY: This document declares a limited preemption of state and local regulations which preclude amateur communications. The ruling is necessary so that amateurs and local governing bodies alike will be aware of the strong federal interest in promoting amateur communications. The effect of the ruling is to give local communities and amateur operators a clear statement of the federal interest in amateur communications.

Adopted: September 16, 1985.
Released: September 19, 1985.

ADDRESS: Federal Communications Commission,
Washington, DC 20554.
FOR FURTHER INFORMATION CONTACT:
Maurice J. DePont, Private Radio Bureau,
Washington, DC 20554, (202) 632-4964.

TEXT: SUPPLEMENTARY INFORMATION:
List of Subjects in 47 CFR Part 97
Amateur radio, Antennas, Radio.

MEMORANDUM OPINION AND ORDER

In the matter of Federal preemption of state and local regulations pertaining to Amateur radio facilities; PRB-1.

By the Commission: Commissioner Rivera not participating.

BACKGROUND

1. On July 16, 1984, the American Radio Relay League, Inc. (ARRL) filed a Request for Issuance of a Declaratory Ruling asking us to delineate the limitations of local zoning and other local and state regulatory authority over Federally-licensed radio facilities. Specifically, the ARRL wanted an explicit statement that would preempt all local ordinances which provably preclude or significantly inhibit effective, reliable amateur radio communications. The ARRL acknowleges [*sic*] that local authorities can regulate amateur installations to insure the safety and health of persons in the community, but believes that those regulations cannot be so restrictive that they preclude effective amateur communications.

2. Interested parties were advised that they could file comments in the matter.[n1] With extension, comments were due on or before December 26, 1984,[n2] with reply comments due on or before January 25, 1985[n3]. Over sixteen hundred comments were filed.

LOCAL ORDINANCES

3. Conflicts between amateur operators regarding radio antennas and local authorities regarding restrictive ordinances are common. The amateur operator is governed by the regulations contained in Part 97 of our rules. Those rules do not limit the height of an amateur antenna but they require, for aviation safety reasons, that certain FAA notification and FCC approval procedures must be followed for antennas which exceed 200

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n1 **Public Notice, August 30, 1984, Mimeo. No. 6299, 49 FR 36113, September 14, 1984.**

n2 **Public Notice, December 19, 1984, Mimeo No. 1498.**

n3 **Order, November 8, 1984, Mimeo, No. 770.**

feet in height above ground level or antennas which are to be erected near airports. Thus under FCC rules some amateur antenna support structures require obstruction marking and lighting. On the other hand, local municipalities or governing bodies frequently enact regulations limiting antennas and their support structures in height and location, e.g. to side or rear yards, for health, safety or aesthetic considerations. These limiting regulations can result in conflict because the effectiveness of the communications that emanate from an amateur radio station are directly dependent upon the location and the height of the antenna. Amateur operators maintain that they are precluded from operating in certain bands allocated for there use if the height of their antennas is limited by a local ordinance.

4. Examples of restrictive local ordinances were submitted by several amateur operators in this proceeding. Stanley J. Cichy, San Diego, California, noted that in San Diego amateur radio antennas come under a structures ruling which limits building heights to 30 feet. Thus, antennas there are also limited to 30 feet. Alexander Vrenios, Mundelein, Illinois wrote that an ordinance of the Village of Mundelein provides that an antenna must be a distance from the property line that is equal to one and one-half times its height. In his case, he is limited to an antenna tower for his amateur station just over 53 feet in height.

5. John C. Chapman, an amateur living in Bloomington, Minnesota, commented that he was not able to obtain a building permit to install an amateur radio antenna exceeding 35 feet in height because the Bloomington city ordinance restricted "structures" heights to 35 feet. Mr. Chapman said that the ordinance, when written, undoubtedly applied to buildings but was now being applied to antennas in the absence of a specific ordinance regulating them. There were two options open to him if he wanted to engage in amateur communications. He could request a variance to the ordinance

by way of a hearing before the City Council, or he could obtain affidavits from his neighbors swearing that they had no objection to the proposed antenna installation. He got the building permit after obtaining the cooperation of his neighbors. His concern, however, is that he had to get permission from several people before he could effectively engage in radio communications for which he had a valid FCC amateur license.

6. In addition to height restrictions, other limits are enacted by local jurisdictions — anti-climb devices on towers or fences around them; minimum distances from high voltage power lines; minimum distances of towers from property lines; and regulations pertaining to the structural soundness of the antenna installation. By and large, amateurs do not find these safety precautions objectionable. What they do object to are the sometimes prohibitive, non-refundable application filing fees to obtain a permit to erect an antenna installation and those provisions in ordinances which regulate antennas for purely aesthetic reasons. The amateurs contend, almost universally, that "beauty is in the eye of the beholder." They assert that an antenna installation is not more aesthetically displeasing than other objects that people keep on their property, e.g. motor homes, trailers, pick-up trucks, solar collectors and gardening equipment.

RESTRICTIVE COVENANTS

7. Amateur operators also oppose restrictions on their amateur operations which are contained in the deeds for their homes or in their apartment leases. Since these restrictive covenants are contractual agreements between private parties, they are not generally a matter of concern to the Commission. However, since some amateurs who commented in this proceeding provided us with examples of restrictive covenants, they are included for information. Mr. Eugene O. Thomas of Hollister, California included in his comments an extract

of the Declaration of Covenants and Restrictions for Ridgemark Estates, County of San Benito, State of California. It provides:

> No antenna for transmission or reception of radio signals shall be erected outdoors for use by any dwelling unit except upon approval of the Directors. No radio or television signals or any other form of electromagnetic radiation shall be permitted to originate from any lot which may unreasonably interfere with the reception of television or radio signals upon any other lot.

Marshall Wilson, Jr. provided a copy of the restrictive covenant contained in deeds for the Bell Martin Addition #2, Irving, Texas. It is binding upon all of the owners or purchasers of the lots in the said addition, his or their heirs, executors, administrators or assigns. It reads: No antenna or tower shall be erected upon any lot for the purposes of radio operations.

William J. Hamilton resides in an apartment building in Gladstone, Missouri. He cites a clause in his lease prohibiting the erection of an antenna. He states that he has been forced to give up operating amateur radio equipment except a hand-held 2 meter (144-148 MHz) radio transceiver. He maintains that he should not be penalized just because he lives in an apartment.

Other restrictive covenants are less global in scope than those cited above. For example, Robert Webb purchased a home in Houston, Texas. His deed restriction prohibited "transmitting or receiving antennas extending above the roof line."

8. Amateur operators generally oppose restrictive covenants for several reasons. They maintain that such restrictions limit the places that they can reside if they want to pursue their hobby of amateur radio. Some state that they impinge on First Amendment rights of free speech. Others believe that a constitutional right is being abridged because, in their view, everyone has a

right to access the airwaves regardless of where they live.

9. The contrary belief held by housing subdivision communities and condominium or homeowner's associations is that amateur radio installations constitute safety hazards, cause interference to other electronic equipment which may be operated in the home (televisions, radio, stereos) or are eyesores that detract from the aesthetic and tasteful appearance of the housing development or apartment complex. To counteract these negative consequences, the subdivisions and associations include in their deeds, leases or by-laws restrictions and limitations on the location and height of antennas or, in some cases, prohibit them altogether. The restrictive covenants are contained in the contractual agreement entered into at the time of the sale or lease of the property. Purchasers or lessees are free to choose whether they wish to reside where such restrictions on amateur antennas are in effect or settle elsewhere.

SUPPORTING COMMENTS

10. The Department of Defense (DOD) supported the ARRL and emphasized in its comments that continued success of existing national security and emergency preparedness telecommunications plans involving amateur stations would be severely diminished if state and local ordinances were allowed to prohibit the construction and usage of effective amateur transmission facilities. DOD utilizes volunteers in the Military Affiliate Radio Service (MARS),[n4] Civil Air Patrol (CAP) and the Radio Amateur Civil Emergency Service (RACES). It points out that these volunteer communicators are operating radio equipment installed in their homes and that undue restrictions on antennas by local authorities

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n4 MARS is solely under the auspices of the military which recruits volunteer amateur operators to render assistance to it. The Commission is not involved in the MARS program.

adversely affect their efforts. DOD states that the responsiveness of these volunteer systems would be impaired if local ordinances interfere with the effectiveness of these important national telecommunication resources. DOD favors the issuance of a ruling that would set limits for local and state regulatory bodies when they are dealing with amateur stations.

11. Various chapters of the Amercian [*sic*] Red Cross also came forward to support the ARRL's request for a preemptive ruling. The Red Cross works closely with amateur radio volunteers. It believes that without amateurs' dedicated support, disaster relief operations would significantly suffer and that its ability to serve disaster victims would be hampered. It feels that antenna height limitations that might be imposed by local bodies will negatively affect the service now rendered by the volunteers.

12. Cities and counties from various parts of the United States filed comments in support of the ARRL's request for a Federal preemption ruling. The comments from the Director of Civil Defense, Port Arthur, Texas are representative:

> The Amateur Radio Service plays a vital role with our Civil Defense program here in Port Arthur and the design of these antennas and towers lends greatly to our ability to communicate during times of disaster.
>
> We do not believe there should be any restrictions on the antennas and towers except for reasonable safety precautions. Tropical storms, hurricanes and tornadoes are a way of life here on the Texas Gulf Coast and good communications are absolutely essential when preparing for a hurricane and even more so during recovery operations after the hurricane has passed.

13. The Quarter Century Wireless Association took a strong stand in favor of the issuance of a declaratory

ruling. It believes that Federal preemption is necessary so that there will be uniformity for all Amateur radio installations on private property throughout the United States.

14. In its comments, the ARRL argued that the Commission has the jurisdiction to preempt certain local land use regulations which frustrate or prohibit amateur radio communications. It said that the appropriate standard in preemption cases is not the extent of state and local interest in a given regulation, but rather the impact of that regulation of Federal goals. Its position is that Federal preemption is warranted whenever local governmental regulations relate adversely to the operational aspects of amateur communication. The ARRL maintains that localities routinely employ a variety of land use devices to preclude the installation of effective amateur antennas, including height restrictions, conditional use permits, building setbacks and dimensional limitations on antennas. It sees a declaratory ruling of Federal preemption as necessary to cause municipalities to accommodate amateur operator needs in land use planning efforts.

15. James C. O'Connell, an attorney who has represented several amateurs before local zoning authorities, said that requiring amateurs to seek variances or special use approval to erect reasonable antennas unduly restricts the operation of amateur stations. He suggested that the Commission preempt zoning ordinances which impose antenna height limits of less than 65 feet. He said that this height would represent a reasonable accommodation of the communication needs of most amateurs and the legitimate concerns of local zoning authorities.

OPPOSING COMMENTS

16. The City of La Mesa, California has a zoning regulation which controls amateur antennas. Its comments reflected an attempt to reach a balanced view.

This regulation has neither the intent, nor the effect, of precluding or inhibiting effective and reliable communications. Such antennas may be built as long as their construction does not unreasonably block views or constitute eyesores. The reasonable assumption is that there are always alternatives at a given site for different placement, and/or methods for aesthetic treatment. Thus, both public objectives of controlling land use for the public health, safety, and convenience, and providing an effective communications network, can be satisfied.

A blanket ruling to completely set aside local control, or a ruling which recognizes control only for the purpose of safety of antenna construction, would be contrary to legitimate local control.

17. Comments from the County of San Diego state:

While we are aware of the benefits provided by amateur operators, we oppose the issuance of a preemption ruling which would elevate 'antenna effectiveness' to a position above all other considerations. We must, however, argue that the local government must have the ability to place reasonable limitations upon the placement and configuration of amateur radio transmitting and receiving antennas. Such ability is necessary to assure that the local decision-makers have the authority to protect the public health, safety and welfare of all citizens.

In conclusion, I would like to emphasize an important difference between your regulatory powers and that of local governments. Your Commission's approval of the preemptive requests would establish a 'national policy'. However, any regulation adopted by a local jurisdiction could be overturned by your Commission or

a court if such regulation was determined to be unreasonable.

18. The City of Anderson, Indiana, summarized some of the problems that face local communities:

> I am sympathetic to the concerns of these antenna owners and I understand that to gain the maximum reception from their devices, optimal location is necessary. However, the preservation of residential zoning districts as 'liveable' neighborhoods is jeopardized by placing these antennas in front yards of homes. Major problems of public safety have been encountered, particularly vision blockage for auto and pedestrian access. In addition, all communities are faced with various building lot sizes. Many building lots are so small that established setback requirements (in order to preserve adequate air and light) are vulnerable to the unregulated placement of these antennas.
>
> . . . the exercise of preemptive authority by the FCC in granting this request would not be in the best interest of the general public.

19. The National Association of Counties (NACO), the American Planning Association (APA) and the National League of Cities (NLC) all opposed the issuance of an antenna preemption ruling. NACO emphasized that federal and state power must be viewed in harmony and warns that Federal intrusion into local concerns of health, safety and welfare could weaken the traditional police power exercised by the state and unduly interfere with the legitimate activities of the states. NLC believed that both Federal and local interests can be accommodated without preempting local authority to regulate the installation of amateur radio antennas. The APA said that the FCC should continue to leave the issue of regulating amateur antennas with the local government and with the state and Federal courts.

DISCUSSION

20. When considering preemption, we must begin with two constitutional provisions. The tenth amendment provides that any powers which the constitution either does not delegate to the United States or does not prohibit the states from exercising are reserved to the states. These are the police powers of the states. The Supremacy Clause, however, provides that the constitution and the laws of the United States shall supersede any state law to the contrary. Article III, Section 2. Given these basic premises, state laws may be preempted in three ways: First, Congress may expressly preempt the state law. See *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). Or, Congress may indicate its intent to completely occupy a given field so that any state law encompassed within that field would implicity [*sic*] be preempted. Such intent to preempt could be found in a congressional regulatory scheme that was so pervasive that it would be reasonable to assume that Congress did not intend to permit the states to supplement it. See *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982). Finally, preemption may be warranted when state law conflicts with federal law. Such conflicts may occur when "compliance with both Federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142, 143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Furthermore, federal regulations have the same preemptive effect as federal statutes, *Fidelity Federal Savings & Loan Association* v. *de la Cuesta, supra.*

21. The situation before us requires us to determine the extent to which state and local zoning regulations may conflict with federal policies concerning amateur radio operators.

22. Few matters coming before us present such a clear dichotomy of viewpoint as does the instant issue. The cities, counties, local communities and housing associations see an obligation to all of their citizens and try to address their concerns. This is accomplished through regulations, ordinances or covenants oriented toward the health, safety and general welfare of those they regulate. At the opposite pole are the individual amateur operators and their support groups who are troubled by local regulations which may inhibit the use of amateur stations or, in some instances, totally preclude amateur communications. Aligned with the operators are such entities as the Department of Defense, the American Red Cross and local civil defense and emergency organizations who have found in Amateur Radio a pool of skilled radio operators and a readily available backup network. In this situation, we believe it is appropriate to strike a balance between the federal interest in promoting amateur operations and the legitimate interests of local governments in regulating local zoning matters. The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides.

23. Preemption is primarily a function of the extent of the conflict between federal and state and local regulation. Thus, in considering whether our regulations or policies can tolerate a state regulation, we may consider such factors as the severity of the conflict and the reasons underlying the state's regulations. In this regard, we have previously recognized the legitimate and important state interests reflected in local zoning regulations. For example, in *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), we recognized that

> . . . countervailing state interests inhere in the present situation . . . For example, we do not wish to preclude a state or locality from exercising jurisdiction over certain elements of an SMATV operation that properly may fall within its

authority, such as zoning or public safety and health, provided the regulation in question is not undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective and so long as the non-federal regulation is applied in a nondiscriminatory manner.

24. Similarly, we recognize here that there are certain general state and local interests which may, in their even-handed application, legitimately affect amateur radio facilities. Nonetheless, there is also a strong federal interest in promoting amateur communications. Evidence of this interest may be found in the comprehensive set of rules that the Commission has adopted to regulate the amateur service.[n5] Those rules set forth procedures for the licensing of stations and operators, frequency allocations, technical standards which amateur radio equipment must meet and operating practices which amateur operators must follow. We recognize the Amateur radio service as a voluntary, noncommercial communication service, particularly with respect to providing emergency communications. Moreover, the amateur radio service provides a reservoir of trained operators, technicians and electronic experts who can be called on in times of national or local emergencies. By its nature, the Amateur Radio Service also provides the opportunity for individual operators to further international goodwill. Upon weighing these interests, we believe a limited preemption policy is warranted. State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted.

25. Because amateur station communications are only as effective as the antennas employed, antenna height restrictions directly affect the effectiveness of amateur

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n5 47 CFR Part 97.

communications. Some amateur antenna configurations require more substantial installations than others if they are to provide the amateur operator with the communications that he/she desires to engage in. For example, an antenna array for international amateur communications will differ from an antenna used to contact other amateur operators at shorter distances. We will not, however, specify any particular height limitation below which a local government may not regulate, nor will we suggest the precise language that must be contained in local ordinances, such as mechanisms for special exceptions, variances, or conditional use permits. Nevertheless, local regulations which involve placement, screening, or height of antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose.[n6]

26. Obviously, we do not have the staff or financial resources to review all state and local laws that affect amateur operations. We are confident, however, that state and local governments will endeavor to legislate in a manner that affords appropriate recognition to the important federal interest at stake here and thereby avoid unnecessary conflicts with federal policy, as well as time-consuming and expensive litigation in this area. Amateur operators who believe that local or state governments have been overreaching and thereby have precluded accomplishment of their legitimate communications goals, may, in addition, use this document to bring our policies to the attention of local tribunals and forums.

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n6 We reiterate that our ruling herein does not reach restrictive covenants in private contractual agreements. Such agreements are voluntarily entered into by the buyer or tenant when the agreement is executed and do not usually concern this Commission.

27. Accordingly, the Request for Declaratory Ruling filed July 16, 1984, by the American Radio Relay League, Inc., is granted to the extent indicated herein and, in all other respects, is denied.

Federal Communications Commission

William J. Tricarico,
Secretary.

[FR Doc. 85-22968 Filed 9-24-85; 8:45 am]

APPENDIX H

DEFENDANT'S EXHIBIT 8

Supreme Court, U.S.
FILED
JAN 11 1995
OFFICE OF THE CLERK

No. 94-1040

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

CITY OF DEARBORN,

Petitioner,

v.

RONALD LOSCHIAVO and DONNA LOSCHIAVO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
STEPHEN L. GOODMAN
MELANIE HARATUNIAN
WILLIAM F. MAHER, JR.
HALPRIN, TEMPLE
& GOODMAN
1100 New York Ave., N.W.
Suite 650 East
Washington, D.C. 20005
(202) 371-9100

HENRY W. UNDERHILL, JR.
(Counsel of Record)
DONNA CLEMON-SACKS
NATIONAL INSTITUTE
OF MUNICIPAL LAW
OFFICERS, INC.
1000 Connecticut Avenue, N.W.
Suite 902
Washington, D.C. 20036
(202) 466-5421

WILLIAM L. STEUDE
MICHIGAN MUNICIPAL
LEAGUE
1675 Green Road
Ann Arbor, Michigan 48106

Attorneys for Amici Curiae.

Washington, D.C. • THIEL PRESS • (202) 328-3286

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MOTION OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, INC. AND THE MICHIGAN MUNICIPAL LEAGUE FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF A PETITION FOR WRIT OF CERTIORARI

The National Institute of Municipal Law Officers, Inc. ("NIMLO") and the Michigan Municipal League move this Court, pursuant to Rule 37.2 of the Rules of the Supreme Court of the United States, for leave to file the accompanying brief *amici curiae.* Petitioner City of Dearborn ("Dearborn") consents to, and respondents Ronald and Donna Loschiavo do not oppose, the filing of this brief.

I.
IMPORTANCE OF THE ISSUES

The principal issue raised by Dearborn's Petition for Writ of Certiorari is whether an individual has a federal cause of action under 42 U.S.C. §1983 against state or local zoning authorities if their ordinances are deemed to be preempted by 47 C.F.R. §25.104, a regulation of the Federal Communications Commission ("FCC") regarding satellite dishes.

Traditionally, individuals seeking to challenge municipal zoning ordinances avail themselves of state and local causes of action and remedies. In the event that they allege that the ordinance violates the proper distribution of powers within the federal system, they can seek to have the ordinance preempted. The Sixth Circuit's ruling below creates a separate cause of action under 42 U.S.C. §1983 against state or local zoning authorities if such an ordinance is preempted by 47 C.F.R. §25.104. As a result of that decision, not only will the resulting preemption bar municipal authorities from enforcing their zoning ordinances, but it could subject zoning authorities to a 42 U.S.C. §1983 cause of action resulting in federal liability for damages and attorney's fees. The threat of such liability could well result in altering local authorities' reasonable discretion to regulate the installation of satellite dishes as contemplated and permitted by the FCC regulations, effectively undermining local ability to administer residential zoning regulations for the benefit of its citizenry.

II.
INTEREST OF *AMICI*

NIMLO, a national organization comprised of more than 1,500 local governments, municipalities and other political subdivisions of states, is operated by the chief legal officers of its members who are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of their citizens through the regulation of matters of local and municipal concern. The Michigan Municipal League, representing some 509 Michigan cities and villages, is a non-profit corporation whose purpose is to improve municipal government and administration through cooperative effort.

NIMLO and the Michigan Municipal League are vitally interested in ensuring that municipalities are not unnecessarily and improperly subject to federal liability for damages and attorney's fees resulting from a 42 U.S.C. §1983 cause of action. The underlying opinion from the Sixth Circuit permits such an outcome.

WHEREFORE, NIMLO and the Michigan Municipal League respectfully request that their Motion for Leave to File Brief *Amici Curiae* in Support of Petition for a Writ of Certiorari be granted.

Respectfully submitted,

HENRY W. UNDERHILL, JR.
(Counsel of Record)
NATIONAL INSTITUTE
OF MUNICIPAL
LAW OFFICERS, INC.
1000 Connecticut Ave., N.W.
Suite 902
Washington, D.C. 20036
(202) 466-5421

January 11, 1995

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THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

This *amici curiae* brief is filed on behalf of the more than 1,500 local governments that are members of the National Institute of Municipal Law Officers, Inc. ("NIMLO"), as well as the some 509 Michigan cities and villages that are members of the Michigan Municipal League. The composition of this collective membership demonstrates that *Amici* have a compelling interest in decisions, such as that of the Sixth Circuit, which adversely affect local governments.

NIMLO is a national organization comprised of municipalities and other political subdivisions of states. NIMLO is operated by the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, and such other legally related titles. These attorneys are responsible for advising local governments on the best methods of promoting the health, safety, and welfare of their citizens through the regulation of matters of local and municipal concern. These attorneys also represent their governments in litigation resulting from the enforcement of such regulations.

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is to improve municipal government and administration through cooperative effort. Among its cooperative efforts is the Michigan Municipal League Legal Defense Fund, ("Legal Defense Fund"), which the Michigan Municipal League operates through a Board of Directors. The purpose of the Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The Sixth Circuit decision has broad implications beyond the authority of a state or local government to regulate satellite dishes. That decision imposes an enormous potential liability on state and local zoning authorities, causing grave concern for the municipalities and their respective legal officers throughout the country that *Amici* represent. *Amici* are well-situated to provide this Court with a perspective on the public policy considerations raised by this decision.

SUMMARY OF ARGUMENT

At issue in this case is no less than the time-honored police power of municipalities to foster and protect the health, safety, aesthetics and welfare of their citizens through the establishment of zoning regulations. Although the courts traditionally have zealously defended the exercise of such police powers, the Sixth Circuit determined that individuals have a federal cause of action under 42 U.S.C. §1983 against state or local zoning authorities whenever their ordinances are deemed to be preempted by 47 C.F.R. §25.104, a regulation of the Federal Communications Commission ("FCC") regarding satellite dishes. As a result of the court of appeals' decision, not only will the resulting preemption bar local authorities from enforcing their zoning ordinances, but it could subject such authorities to a 42 U.S.C. §1983 cause of action resulting in federal liability for damages and attorney's fees. The resulting chilling effect on state and local governments' police power is particularly disturbing because the regulatory scheme of 47 C.F.R. §25.104 does not appear to create a cause of action under 42 U.S.C. §1983. Instead, that scheme permits several types of alternative remedies to homeowners seeking to challenge satellite dish zoning ordinances. Moreover, given that the standard on which such preemptions are based tends to fluctuate, there is no clearly defined basis for state and local authorities to foresee what ordinances will be preempted and may be subject to liability from 42 U.S.C. §1983.

In addition, the Sixth Circuit's opinion conflicts with the Ninth Circuit's decision in *Johnson v. City of Pleasonton,* which upheld a lower court's ruling that no 42 U.S.C. §1983 cause of action exists for a local zoning ordinance similarly preempted by 47 C.F.R. §25.104.

If this Court does not resolve the resulting ambiguity, similarly-situated parties throughout the United States are likely to file suit in federal court to assert their putative rights under 42 U.S.C. §1983.

ARGUMENT

I.

ALLOWING THE SIXTH CIRCUIT DECISION TO STAND WILL IMPEDE STATE AND LOCAL GOVERNMENTS' POLICE POWER.

The Sixth Circuit's ruling creates a cause of action under 42 U.S.C. §1983 against state or local zoning authorities if their ordinances are deemed to be preempted by 47 C.F.R. §25.104.[1] As a consequence of the court of appeals' decision, if a state or local zoning authority regulating the installation of satellite dishes miscalculates the delicate balance between (1) fostering and protecting the health, safety, aesthetics, and welfare of its citizens, and (2) avoiding an "unreasonable" infringement on the federal interest in the reception of satellite signals, not only will the resulting preemption bar local authorities from enforcing their zoning ordinances, but it could subject such authorities to a 42

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[1] 47 C.F.R. §24.104 states, in pertinent part:

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations:

(a) Have a reasonable and clearly defined health, safety or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

U.S.C. §1983 cause of action resulting in federal liability for damages and attorney's fees. The threat of such liability could well alter local authorities' reasonable discretion to regulate the installation of satellite dishes as contemplated and permitted by the FCC, effectively undermining local ability to administer residential zoning regulations to the detriment of a state's citizenry.

The ruling below's chilling effect on state and local governments' police power is all the more disturbing given that the regulatory scheme created by 47 C.F.R. §25.104 does not appear to create a 42 U.S.C. §1983 cause of action.[2] The exercise of police power, such as the establishment of zoning regulations, is the sovereign right of a government to promote order, safety, health, morals, aesthetics, and general welfare within constitutional limits and is an essential attribute of government.[3] In the interest of federalism, police powers of the states are not to be infringed absent an unambiguous federal intent.[4]

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[2] *See Johnson v. City of Pleasanton*, 781 F.Supp. 632 (N.D. Cal. 1991), *aff'd* 982 F.2d 350 (9th Cir. 1992) (no private right of enforcement exists under 42 U.S.C. §1983 for a local zoning ordinance preempted by 47 C.F.R. §25.104); *see also Abbott v. City of Cape Canaveral*, 840 F. Supp. 880, 886 (D.C.M.D. Fla. 1994) ("the right to receive satellite television programming of one's choice is not a fundamental right [that leads to the creation of a 42 U.S.C. §1983 cause of action]").

[3] *See, e.g., Brendale v. Yakima Indian Nation*, 492 U.S. 408, 433 (1989) ("Zoning is a process whereby a community defines its essential character. Whether driven by a concern for health and safety, esthetics, or other public values, zoning provides the mechanism by which the polity ensures that neighboring uses of land are not mutually – or more often – unilaterally destructive."); *see also Black's Law Dictionary* 1317 (4th ed. 1968).

[4] *See Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, 715 (1985) *citing Jones v. Rath Packing Co.*, 430

[footnote continued]

In adopting only a limited preeemption, the FCC clearly intended to preserve, to the greatest extent possible, the ability of state and local governments to regulate health, safety, and aesthetic goals through their zoning ordinances.[5] The FCC expressly envisioned leaving state and local governments free to regulate satellite reception up to and until such regulations are deemed "unreasonable."[6] It stated that, so long as they have a reasonable and clearly defined health, safety or aesthetic objective:

> Non-federal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment.

Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, Report and Order, 51 Fed. Reg. 5519 at para. 32. If such non-federal regulations are deemed to "unreasonably" interfere with satellite reception, they are preempted. At least one

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U.S. 519, 525 (1977) *and quoting Rice v. Santa Fe Elevator Corp.*, 450 U.S. 662, 670 (1981).

[5] *See, e.g.*, 47 C.F.R. §25.104(a); *see also Preemption of Local Zoning or Other Regulation of Receive Only Satellite Earth Stations*, 2 FCC Rcd 202 (1987) ("because of the traditional local interest in land use regulation, we decided to adopt a limited preemption which would protect the federal interest in assuring access to interstate satellite-delivered signals which in turn would allow local governments reasonable flexibility in administering zoning plans.")

[6] *See* 47 C.F.R. §25.104(b); *accord Abbott v. City of Cape Canaveral*, 840 F. Supp. at 885 (upholding defendant's argument that 47 C.F.R. §25.104 contemplates allowing local ordinances to interfere with satellite reception until they prevent satellite telecommunications from competing with other modes of telecommunications).

federal court has held that this preemption remedy precludes an additional private cause of action under 42 U.S.C. §1983.[7]

The regulatory scheme created by the FCC in adopting 47 C.F.R. §25.104 permits several types of remedies for injured parties other than 42 U.S.C. §1983. First, plaintiffs can avail themselves of traditional state remedies for appealing local zoning decisions. Second, injured parties do not need 42 U.S.C. §1983 to assert that a zoning ordinance violates the proper distribution of powers within the federal system and should be preempted.[8] Third, parties can seek relief, including damages and/or injunctive remedies, from the FCC.[9]

The Sixth Circuit's imposition of a 42 U.S.C. §1983 cause of action in this context is also of grave concern to state and local governments because it will threaten such entities with federal liability when the only "wrong" committed is misapprehending the precise location of

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[7] *Johnson v. City of Pleasanton*, 781 F. Supp. at 645 ("a private cause of action has arguably been denied . . . by the FCC's provision of an 'alternative' remedy through the preemption provisions of Section 25.104."); *accord Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) ("Given the variety of situations in which preemption claims may be asserted, in state court and in federal court, it would obviously be incorrect to assume that a federal right of action pursuant to §1983 exists every time a federal rule of law preempts state regulatory authority.")

[8] *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. at 114 (Kennedy, J., dissenting, in which Rehnquist, C.J., and O'Connor, J., joined).

[9] *See, e.g., Preemption of Satellite Antenna Zoning Ordinance of Town of Deerfield, New York*, 7 FCC Rcd. 2172 (1992) (FCC granted declaratory ruling that ordinance was preempted under 47 C.F.R. §25.104), *reversed on other grounds, Town of Deerfield v. FCC*, 992 F.2d 420 (2nd Cir. 1993); *see also* 47 U.S.C. §501 *et seq.*

the boundary between state and federal power.[10] While the threat of such liability would be troubling in any context, it is of particular concern where there is no clearly defined basis for state and local authorities to foresee what may constitute "unreasonable" interference warranting preemption under 47 C.F.R. §25.104.

Indeed, it was to avoid this sort of harm that led this Court to establish the test described in *Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498, 509 (1990) requiring, *inter alia*, that the federal law at issue must create an interest that is sufficiently specific to create an enforceable right under 42 U.S.C. §1983. Absent such foreseeability, defendants could find themselves liable for damages and attorneys fees due to a vague or fluctuating federally articulated standard.

The decision below unreasonably subjects state and local governments to liability from a 42 U.S.C. §1983 action based on such a vague or fluctuating standard. Creating a 42 U.S.C. §1983 cause of action based on whether an ordinance is "reasonable" is frequently tenuous.[11] This is particularly true with regulations governing the satellite industry, such as the one at issue here, where rapid technological changes and the attendant modifications to such regulations can quickly alter whether a zoning ordinance's maximum diameter limitations for receive-only satellite dishes are reasonable. For example, several years ago when, depending on its

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[10] *Accord Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. at 114 (Kennedy, J., dissenting, in which Rehnquist, C.J., and O'Connor, J., joined).

[11] *See, e.g., Suter v. Artist M.*, 112 S.Ct. 1360, 1368 (1992) (declining to find a 42 U.S.C. §1983 cause of action where the regulations at issue provided no guidance as to the type of "reasonable" regulation that would be considered acceptable).

location, a dish had to be approximately eight feet in diameter to adequately receive video signals transmitted by satellites, an ordinance prohibiting the installation of dishes greater than six feet in diameter would have effectively precluded reception, been deemed "unreasonable", and been subject to preemption by 47 C.F.R. §25.104.[12] With the recent introduction of Direct Broadcast Satellite technology that utilizes higher powered satellites, dishes need only be eighteen inches in diameter to adequately receive 150 channels of satellite video signals. The advent of such technology has the effect of transforming the aforementioned ordinance from being "unreasonable" to becoming "reasonable".[13]

In sum, the Sixth Circuit's creation of a 42 U.S.C. §1983 cause of action in this case has profound and unnecessary adverse effects on the exercise of police powers by the nation's state and local zoning authorities to the ultimate detriment of their citizenry. *Amici* respectfully submit that these consequences are sufficiently critical to warrant further review by this Court.

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[12] *See Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, 51 Fed. Reg. 5,519 at n.77 (1986).

[13] *Id. Cf. Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 50 Fed. Reg. 35228 (Aug. 30, 1985) (the FCC's decision to allow satellites in orbit to be spaced two, rather than four, degrees apart increased the maximum diameter needed by some dishes to ensure satellite video reception, absent further technological advances, thereby potentially causing a previously "reasonable" ordinance to become "unreasonable.")

II.

ALLOWING THE SIXTH CIRCUIT DECISION TO STAND IS LIKELY TO INCREASE DRAMATICALLY AND UNNECESSARILY THE NUMBER OF DECISIONS THAT FEDERAL COURTS WILL HAVE TO HEAR.

In creating an enforceable right under 42 U.S.C. §1983 for the preemption of a local zoning ordinance by federal regulation 47 C.F.R. §25.104, the Sixth Circuit's decision conflicts with the Ninth Circuit's decision in *Johnson v. City of Pleasanton*, which upheld a lower court's ruling that no private right of enforcement exists under 42 U.S.C. §1983 for a local zoning ordinance similarly preempted by 47 C.F.R. §25.104. This split between the circuits creates a legal ambiguity as to whether 47 C.F.R. §25.104 creates an enforceable right under 42 U.S.C. §1983.

If this Court does not resolve this ambiguity, similarly-situated parties throughout the United States are likely to file suit in federal court to assert their putative rights under 42 U.S.C. §1983. For example, because of the Sixth Circuit's holding, homeowners seeking to install or maintain receive-only satellite dish antennas undoubtedly will be incented to challenge local zoning ordinances in federal court asserting an enforceable right under 42 U.S.C. §1983 in order to recover damages and attorney's fees. Individuals may also rely on the Sixth Circuit opinion to challenge ordinances arguably preempted by the FCC's regulation of Satellite Master Antenna Television ("SMATV") systems,[14] amateur radio towers,[15]

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[14] *Earth Satellite Communications, Inc.*, 95 FCC 2d 1223 (1983), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984). SMATV transmits television signals from satellites directly to satellite receiving stations atop multi-unit dwellings.

[15] *See, e.g., Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991) (appellee asserted a cause of action under 42

[footnote continued]

as well as antenna towers for cellular telephone, paging, and personal communications service ("PCS"),[16] that the Commission is currently contemplating preempting.[17] In light of the array of local, state and federal remedies already available, the ability to assert a private right of action under 42 U.S.C. §1983 in such suits is duplicative and unnecessary.

Moreover, given that the FCC expressly declined to preempt local zoning ordinances that do not "single out" satellite receive-only dishes, the Sixth Circuit's decision may create a perverse incentive for local governments to enact zoning ordinances prohibiting or restricting all types of antennas, not just receive-only satellite dishes. Such ordinances would avoid the preemption[18] on which the Sixth Circuit's creation of a 42 U.S.C. §1983 cause of action relied. Such revised ordinances are likely to

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U.S.C. §1983 where the appellant city's zoning powers over amateur radio towers were partially preempted by the FCC.

[16] PCS is a family of mobile radio communications services and devices that range from advanced wireless replacements for ordinary telephones to radio communications devices capable of sending and receiving voice and data virtually anywhere. *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, 7710-12 (1993).

[17] *See* Cellular Telecommunications Industry Association, Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Service Providers, Petition for Rule Making (FCC, filed Dec. 22, 1994).

[18] *See* 51 Fed. Reg. at 5,526 (partial dissent of FCC Commissioner Mimi Weyforth Dawson noting that the FCC's adoption of 47 C.F.R. §25.104 created an "enormous loophole . . . since blanket bans against all antennas . . . are entirely permissible under the majority's rule").

spawn a host of additional legal challenges that will have to be addressed by the courts.

By definitively ruling that 47 C.F.R. §25.104 does not create an enforceable right under 42 U.S.C. §1983, this Court can prevent the filing of a multitude of unnecessary suits, in the federal district and circuit courts as well as those eventually reaching this Court, that the decision below will encourage.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that a writ of certiorari should issue to review the judgement below.

Respectfully submitted,

HENRY W. UNDERHILL, JR.
NATIONAL INSTITUTE
OF MUNICIPAL
LAW OFFICERS
1000 Connecticut Ave., N.W.
Suite 902
Washington, D.C. 20036
(202) 466-5421
Counsel of Record for
Amici Curiae.

January 11, 1995

FILED
JAN 9 1995
OFFICE OF THE CLERK

No. 94-1040

In The

Supreme Court of the United States

October Term, 1994

CITY OF DEARBORN,

Petitioner,

vs.

RONALD LOSCHIAVO and
DONNA LOSCHIAVO, his wife,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JOHN W. GRIFFEN, JR. (P14375)*
LISA SYMULA-NAHIKIAN (P41171)
KRISTINE L. COOK (P49748)
WILLIAMS, SCHAEFER, RUBY & WILLIAMS, P.C.
380 North Woodward Avenue, Suite 300
Birmingham, Michigan 48009
(810) 642-0333

Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESTATED QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS CONCLUSION THAT A PRIVATE RIGHT OF ACTION EXISTS UNDER 42 U.S.C. §1983 TO ENFORCE RIGHTS UNDER FCC REGULATION, 47 C.F.R. §25.104 CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *JOHNSON v. CITY OF PLEASANTON*, 982 F.2d 350 (9th Cir. 1992)?

II.

WHETHER THE COURT OF APPEALS CONCLUSION THAT FCC REGULATION, 47 C.F.R. §25.104 CREATES AN ENFORCEABLE RIGHT UNDER 42 U.S.C. §1983 IS ERRONEOUS?

III.

WHETHER THE COURT OF APPEALS ERRED IN STATING THAT REASONABLENESS IS EASILY SUSCEPTIBLE OF JUDICIAL EVALUATION AND WHETHER IT MADE PROPER EVALUATION OF THE REASONABLENESS OF DEARBORN'S ORDINANCE?

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WHETHER THE NINTH CIRCUIT'S ANALYSIS IN *HOWARD v. BURLINGAME*, 937 F.2d 1376 (9th Cir. 1991) OF THE FCC REGULATION APPLICABLE TO AMATEUR RADIO ANTENNAS, APPLIES TO AND CONTROLS DISPOSITION OF RESPONDENTS' 42 U.S.C. §1983 CLAIMS FOR ENFORCEMENT OF THEIR RIGHTS UNDER 47 C.F.R. §25.104 CONCERNING SATELLITE RECEPTION ANTENNAS?

V.

WHETHER THIS CASE IS A LAND USE DISPUTE WHICH SHOULD BE LITIGATED IN THE STATE COURT?

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WHETHER THE DECISION OF THE COURT OF APPEALS HAS RADICALLY ENLARGED THE SCOPE OF 42 U.S.C. §1983?

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OPINIONS BELOW

Respondents rely upon Petitioner's Statement.

JURISDICTION

Respondents rely upon Petitioner's Statement.

RESTATED FEDERAL AND STATE STATUTES INVOLVED

This Petition involves 42 U.S.C. §1983, 42 U.S.C. §1988, 47 U.S.C. §605 and 47 C.F.R. §25.104 which are reproduced in Petitioner's Appendix F. The Dearborn Zoning Ordinance No. 81-33, §501-e is also involved and reproduced in Petitioner's Appendix F. Lastly, this Petition involves the FCC Report and Order, *In the matter of Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations,* 51 Fed. Reg. 5519 (1986). ("Report and Order") The Report and Order is reproduced in Respondents' Appendix I.

Respondents exclude the Michigan Compiled Laws cited by Petitioner for the reason that Petitioner has neither argued nor relied upon the applicability of the state statutes to any issues which were summarily decided or tried at the District Court level or reviewed on appeal by the Sixth Circuit.

RESTATED STATEMENT OF THE CASE

On October 13, 1990, a satellite reception antenna was erected in the rear yard of the Loschiavos' home in Dearborn, Michigan. The antenna is ten feet in diameter

and is mounted on a 20 foot mast. (J.A. 57-58) Three days after the installation of the receive-only satellite antenna, a notice of violation was issued to the Loschiavos by the City for failing to comply with Dearborn Zoning Ordinance No. 81-33, §501-e, et seq. (*Loschiavo* District Court Opinion (3/17/92), Petitioner's Appendix E-2) The ordinance requires that anyone installing a receive-only satellite dish antenna which exceeds three feet in diameter must obtain approval from the Dearborn Zoning Board of Appeals. The ordinance prohibits satellite reception antennas in excess of eight feet in diameter and provides that no part of the antenna may extend higher than twelve feet above grade. The Ordinance does permit the Zoning Board of Appeals to authorize additional uses if they are "in harmony with the character of the district." No guidelines or parameters however are specified in the Ordinance. (Petitioner's Appendix F-21)

The Loschiavos applied to the Dearborn Zoning Board of Appeals for a variance to exceed the size and height limitations of the ordinance. Following a hearing on November 28, 1990, the Loschiavos' application was denied and the Zoning Board of Appeals ordered the removal of the antenna. (*Loschiavo* District Court Opinion (3/17/92), Petitioner's Appendix E-2)

Following the Dearborn Zoning Board's denial of the Loschiavos' application for variance, a Complaint was filed in the United States District Court for the Eastern District of Michigan. The Complaint alleged violation of the Loschiavos' rights under the First and Fourteenth Amendments, violation of their rights under 42 U.S.C. §1983 and sought a declaratory judgment that the Dearborn Zoning Ordinance was preempted by 47 C.F.R. §25.104. The Ordinance was preempted because it differentiated between satellite receive-only antennas and

other types of antennas, and did not redeem itself under the two prong test set forth in the FCC Regulation. Such test required that 1) the ordinance have a clearly defined health, safety and aesthetic objective, *and* 2) that it does not impose unreasonable limitations on, or prevent reception of, satellite delivered signals or impose costs on users of such antennas that are excessive in light of the purchase and installation cost of the equipment. 47 C.F.R. §25.104. The relief sought by the Loschiavos included a declaratory judgment that the Ordinance was preempted, a permanent injunction, money damages, attorney fees and other relief deemed appropriate by the Court.

The District Court had subject matter jurisdiction over the Loschiavos' claims pursuant to 28 U.S.C. §1331 as federal questions were raised under 47 U.S.C. §605 and 47 C.F.R. §25.104, as well as the First and Fourteenth Amendment claims. With regard to the 42 U.S.C. §1983 claim, the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1343(a)(3).

On January 9, 1992, the District Court conducted a hearing on the parties' Cross-Motions for Summary Judgment. The District Court granted in part Dearborn's motion dismissing the First and Fourteenth Amendment counts and the claim under 42 U.S.C. §1983. The Court held there was no private right of action under the Civil Rights Act for violation of the FCC satellite reception antenna preemption regulation. (Petitioner's Appendix C-13, 14) The Loschiavos' Motion for Summary Judgment was denied and the matter preceded to trial on the preemption issue in February, 1992.

The District after trial found in a Memorandum Opinion and Judgment that the Ordinance was preempted. The Court acknowledge the Ordinance had a

reasonable and clearly defined health, safety and aesthetic objective, but found that the Ordinance unreasonably restricted satellite signal reception in violation of the second prong of the FCC Regulation. The Court found the Ordinance unreasonably restricted reception, in part, because it did not contain any express provisions for flexibility for property where the satellite sight lines are blocked, as was the case with the Loschiavos. The District Court then specifically held that the provision allowing additional uses which were "in harmony with the character of the district" was inadequate because it balanced aesthetic concerns with the right to reception. Such balancing of the FCC intent with aesthetic concerns could not be performed as the Court was bound by the legislative intent of the FCC to forbid unreasonable restrictions upon reception. (Petitioner's Appendix E-5) A permanent injunction against enforcement of the preemption Ordinance was entered.

The Loschiavos appealed from the Summary Judgment dismissal of their 42 U.S.C. §1983 claim. A Cross-Appeal was filed by Dearborn on the preemption issue.

The Sixth Circuit Court of Appeals reversed the District Court on the 42 U.S.C. §1983 claim, holding that such a private right of action was available to the Loschiavos under 42 U.S.C. §1983 to enforce their right to a satellite reception antenna.

The Court of Appeals affirmed the injunctive relief granted to the Loschiavos prohibiting enforcement of the preempted Dearborn Ordinance. (Petitioner's Appendix A-9)

Dearborn filed a Petition for Rehearing *En Banc* on September 21, 1994. The Loschiavos were requested to file a Response to the Petition. None of the active Judges of the Sixth Circuit requested a poll on the suggestion for

Rehearing *En Banc*. The Petition was then referred to the original hearing panel and was denied on November 22, 1994. (Petitioner's Appendix B)

Dearborn filed its Petition for a *Writ of Certiorari* with this Court on December 12, 1994.

ARGUMENT

I.

THE COURT OF APPEALS CONCLUSION THAT A PRIVATE RIGHT OF ACTION EXISTS UNDER 42 U.S.C. §1983 TO ENFORCE RIGHTS UNDER FCC REGULATION, 47 C.F.R. §25.104 IS NOT IN CONFLICT WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IN *JOHNSON v. CITY OF PLEASANTON*, 982 F.2d 350 (9th Cir. 1992).

The District Court after a bench trial held that the Dearborn Ordinance was preempted by 47 C.F.R. §25.104. However, it had previously granted Dearborn's Motion for Summary Judgment dismissing the Loschiavos' claim under 42 U.S.C. §1983. The District Court followed the Northern District of California decision in *Johnson v. City of Pleasanton*, 781 F. Supp. 632 (N.D. Cal. 1991). The Court of Appeals for the Sixth Circuit in the instant case after an independent analysis of the 42 U.S.C. §1983 issue reversed the District Court and held there is a private right of action under 42 U.S.C. §1983 to enforce rights to have a satellite reception antenna as set forth in 47 C.F.R. §25.104.

Dearborn argues that the Sixth Circuit Opinion on the 42 U.S.C. §1983 claim created a split of authority between the Sixth Circuit and Ninth Circuit. Dearborn contends the Northern District of California holding was

affirmed by the Ninth Circuit. *Johnson v. City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992). This assertion is untrue.

Analysis of the *Johnson* cases must begin with the Northern District of California Opinion. The Northern District of California granted the City of Pleasanton's Motion for Summary Judgment dismissing the Plaintiff's First and Fourteenth Amendment claims and the 42 U.S.C. §1983 claim. The Northern District of California also granted the Johnson's Cross-Motion for Summary Judgment on the FCC preemption issue.

The case then proceeded to the Ninth Circuit Court of Appeals where the preempted issue and the First and Fourteenth Amendment issues were briefed by the parties and decided by the Ninth Circuit. The 42 U.S.C. §1983 issue was neither briefed by the parties nor discussed or decided by the Ninth Circuit. See *Johnson v. City of Pleasanton*, 982 F.2d 350 (9th Cir. 1992). The case was remanded to the Northern District of California for trial on the preemption issue. Upon this writer's information and belief, the matter was ultimately settled by the parties and the action has been voluntarily dismissed. There have been no further proceedings in *Johnson* involving the 42 U.S.C. §1983 issue. Accordingly, there is no split of authority between the *Johnson* Ninth Circuit Opinion and the *Loschiavo* Sixth Circuit Opinion on the issue of whether there is a private right of action to enforce rights under 47 C.F.R. §25.104.

II.

THE COURT OF APPEALS CONCLUSION THAT FCC REGULATION, 47 C.F.R. §25.104 CREATES AN ENFORCEABLE RIGHT UNDER 42 U.S.C. §1983 IS NOT ERRONEOUS.

Dearborn argues that no enforceable right exists under 47 C.F.R. §25.104 for the Loschiavos to support a 42

U.S.C. §1983 action. The Loschiavos disagree. The proper test under which to conduct the analysis required to resolve the disagreement is found in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) as follows:

> [1] Did congress intend that the subject provision benefit the Plaintiff;
>
> [2] If so, does the provision create a binding obligation on a governmental unit rather than merely "congressional preference"; and
>
> [3] Is the interest asserted sufficiently clear that it may be judicially enforced. (*Quoting Golden State Transit v. Los Angeles*, 493 U.S. 103, 106 (1989)).

Wilder, 496 U.S. at 509.

The test set forth in *Cort v. Ash*, 422 U.S. 66 (1975) mentioned by Dearborn in its Petition and reviewed by the *Johnson* District Court was not the proper test for review of a private right of action under 47 U.S.C. §605, as the right asserted is an express right of private action. *Wilder*, 496 U.S. at 508 clearly indicates that the *Wilder* test is to be used in an instance of express rights while the *Cort* test is appropriate only in implied rights of actions.

The *Johnson* District Court properly held that the key in determining whether a statute or regulation creates rights enforceable under 42 U.S.C. §1983 is the legislative intent. *Johnson*, 781 F. Supp. at 644, citing *Wright v. Roanoke Development and Housing Authority*, 479 U.S. 431 (1987). However, the *Johnson* District Court finding that the Report and Order was a mere congressional preference was erroneous and unsupported. Contrary to the intentions of Dearborn and the *Johnson* District Court Opinion, the Sixth Circuit Court of Appeals in the instant action properly held:

> [w]e also find there is sufficient mandatory language in the FCC's regulation to create a binding obligation on the City of Dearborn. In unequivocal terms, Section 25.104 provides that local regulations such as Dearborn Ordinance No. 81-33, §501-e 'are preempted' if they unduly limit satellite reception or impose excessive costs on satellite antenna users.

Loschiavo v. City of Dearborn, 33 F.3d-548, 552 (6th Cir. 1994). (Petitioner's Appendix A-7)

The Sixth Circuit Court of Appeals also characterized the language of §25.104 as "a clear command" and "unambiguous in nature". *Loschiavo*, 33 F.3d at 552. (Petitioner's Appendix A-7)

The Report and Order provides for a mandatory preemption. The District Court in *Johnson v. City of Pleasanton*, 781 F.Supp. 632 (N.D. Cal. 1991) fails to explain how such a mandatory preemption could be considered a "mere preference." It is obvious from a reading of the rule adopted that it is mandatory. The FCC in its Report and Order states:

> State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities *are preempted* unless such regulations
>
> (a) Have a reasonable and clearly defined health, safety or aesthetic objective; and
>
> (b) Do not operate to impose unreasonable limitations on or prevent reception of satellite delivered signals by receive-only antennas or to impose costs on users of such antennas that are excessive in light of the purchase and installation cost of the equipment. (Emphasis added)

Preemption of Local Zoning, 51 Fed. Reg. 5519, 5520, ¶ 1 (1986). (Respondents' Appendix 3A)

It is clear that if a local ordinance differentiates between satellite reception antennas and other types of antenna facilities, it is preempted, the burden then shifts to the municipality to prove the ordinance has a reasonable and clearly defined health, safety or aesthetic objective, *and* does not impose unreasonable limitations on reception or unreasonable cost. In the meantime, the ordinance, however, is mandatorily preempted.

The FCC in its Report and Order states:

> Whether a judicial remedy might be available in some cases and to those who can afford litigation is not determinative of our ability or of the necessity to preempt state regulations when they are obstructing federal objectives.

Preemption of Local Zoning, 51 Fed. Reg. at 5523, ¶ 29. (Respondents' Appendix 19A)

Furthermore, the FCC says:

> Satellite antenna users who are dissatisfied with the results of any local zoning decision can use the standards adopted here in pursuing any legal remedies they might have. In addition, we would entertain requests for further action if it appears that local authorities are generally failing to abide by our standards. (Footnotes omitted)

Preemption of Local Zoning, 51 Fed. Reg. at 5524, ¶ 40. (Respondents' Appendix 26A-27A)

The FCC refers to its purpose as being a protection for a right and for the furtherance of congressional purpose. Paragraph 24 of the FCC Report and Order states:

> As stated in our *Notice*, when 'state regulation stands as an obstacle to the accomplishment of a congressional purpose,' such regulation is subject to preemption. Our conclusion was that the records showed local and state regulatory interference with the established federal objectives and thus some of [sic] preemption was warranted. (Footnotes omitted)

Preemption of Local Zoning, 51 Fed. Reg. at 5522, ¶ 24. (Respondents' Appendix 15A)

Further, the FCC Report and Order provides in part:

> If individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by section 705 (sic) [§605] to interstate communications delivered by satellite will be useless. (Footnote omitted)

Id., at ¶ 26. (Respondents' Appendix 17A)

Dearborn argues that because the regulation provides for municipalities to address health, safety and aesthetic concerns, the mandatory preemption is somehow turned into a mere preference. This is a mischaracterization of what the Report and Order provides. It permits municipalities to address these concerns, however, where the concerns result in regulations that unreasonably restrict reception or impose excessive costs, they must give way. The FCC clearly recognizes the distinct technologies associated with satellite dishes in allowing communities certain limited flexibility with respect to their ordinances. The Report and Order was designed to severely limit local interference with the use of dishes and left only narrow and limited regulatory power where local authorities have previously assumed complete and unfettered power to prohibit satellite antenna installations.

These objectives and intent to create rights enforceable by homeowners are directly addressed in Paragraphs 33 and 34 of the Report and Order.

> *If a community chooses to enact an ordinance which differentiates in its treatment of different types of antennas, it must bear a high burden.* Our objective is to insure that satellite receiving antennas are not treated less favorably than other antenna devices such as Amateur Radio antennas and Satellite Master Antenna Systems (SMATV's). *A*

> *community must demonstrate that its regulation meets both paragraph (a) and (b) of our rule.*
>
> . . .
>
> We have retained the use of health, safety and aesthetic objectives but have merely required these to be 'reasonable' and 'clearly defined.' These terms are readily susceptible to application by local authorities and gives some flexibility in the application of local regulations to individual locations. To be more specific in a general national policy statement would be inadvisable. *In addition, requiring local authorities to justify a differentiation in treatment will help insure that local zoning power is not used to restrict unreasonably the installation of satellite receive-only antennas.* (Emphasis added) (Footnotes omitted)

Preemption of Local Zoning, 51 Fed. Reg. at 5523-5524, ¶¶ 33 and 34. (Respondents' Appendix 22A-23A)

As is clear from the foregoing references, the language of the FCC Report and Order itself is the best evidence that it is designed to create a federal right in homeowners and not to just set forth a mere congressional preference.

Numerous cases from jurisdictions nationwide where satellite reception antenna ordinances have been preempted have awarded Plaintiffs attorney fees pursuant to 42 U.S.C. §§1983 and 1988. These cases include *Alsar Technologies, Inc. v. Zoning Board of Adjustment*, 235 N.J. Super. 471, 563 A.2d 83 (N.J., Super. L 1989); *Cawley v. City of Port Jervis*, 753 F. Supp. 128 (S.D.N.Y. 1990); *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024 (D.N.J. 1988); *Village of Elmgrove v. Py*, 724 F. Supp. 612 (E.D. Wis. 1989); and *Ermler v. Town of Brookhaven*, 795 F. Supp. 85 (E.D.N.Y. 1992). However, although these cases award attorney fees, and thus presumptively find that a private right of action exists, none of these cases analyze in depth

the applicability of 42 U.S.C. §1983 to Plaintiffs' claim that zoning ordinances violate and are therefore preempted by the Report and Order.

Other than the cases cited above, the only two Opinions that this writer has been able to find which have ruled on *and* analyzed the applicability of 42 U.S.C. §1983 to Plaintiffs' claims are *Johnson v. City of Pleasanton*, 781 F. Supp. 632 (N.D. Cal. 1991) and *Kessler, et al. v. Town of Niskayuna*, case no. 91-CV-104; 91-CV-464 (N.D.N.Y. 12/26/91). *Johnson*, contrary to all of the prior cases cited above held that there was no 42 U.S.C. §1983 cause of action arising from a municipality violating the Preemption Order. *Kessler*, consistent with the prior Opinions held that such a cause of action is permissible.

The Court of Appeals for the Sixth Circuit properly stated the following regarding §1983 actions:

> Section 1983 creates a cause of action against any person who, under the color of state law, abridges 'rights, privileges, or immunities secured by the Constitution and the laws' of the United States. 42 U.S.C. §1983. In *Maine v. Thiboutot*, 448 U.S. 1, 6-8, 100 S. Ct. 2502, 2505-06, 64 L.Ed.2d 555 (1980), the Supreme Court recognized that plaintiffs may use Section 1983 to enforce not only constitutional rights, but also those rights defined by federal statutes. As federal regulations have the force of law, they likewise may create enforceable rights. *Wright*, 479 U.S. at 431, 107 S. Ct. at 774. Section 1983 is not available, however, "to enforce a violation of the federal statute 'where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute did not create enforceable rights, privileges, or immunities within the meaning of §1983.' " *Suter v. Artist M.*, ___ U.S. ___, ___, 112 S. Ct.

> 1360, 1366, 118 L.Ed.2d 1 (1992) (quoting *Wright*, 479 U.S. at 423, 107 S. Ct. at 770).
>
> *Loschiavo*, 33 F.3d at 551. (Petitioner's Appendix A-4)

Dearborn suggests that the Court of Appeals erred in not applying *Suter's* facts to the case at hand. Dearborn claims that the unreasonable limitations at issue in the FCC Report and Order can be likened to the reasonable efforts at issue in *Suter*. Such is not the case as the regulation at issue in *Suter* is very different from the regulation involved in the instant action. This Court determined that the ultimate inquiry in *Suter* was:

> Did Congress in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family? We now turn to that inquiry.
>
> *Suter*, 112 S. Ct. at 1367.

This Court determined that the Adoption Act at issue did not provide a right enforceable by individuals. Rather, the provisions which were mandatory as to the states could be enforced only by the Secretary for Health and Human Services. This determination was reached by this Court after careful examination of the reasonable efforts language in the context of the entire Act.

On the other hand, the FCC Report and Order at issue mandatorily preempts an ordinance that differentiates between satellite receive-only antennas and other types of antennas. Furthermore, a private right of action is expressly afforded to homeowners to enforce the rights not to have their use of satellite antennas unduly restricted. Report and Order, 51 Fed. Reg. at 5523, 5524. If a municipality's Ordinance is found to differentiate then it is preempted. However, the Ordinance may be revived

if the City establishes that it meets both prongs of the two prong test set forth in the Report and Order. To accomplish this, the municipality's regulation must first have a reasonable and clearly defined health, safety and aesthetic objective. Then the second prong prevents these objectives from being met by imposing unreasonable restrictions on reception or imposing unreasonable costs. The two prong test does not affect the enforceability of the federal right to receive satellite signals which is expressly afforded to homeowners in the Report and Order.

The Court of Appeals for the Sixth Circuit did not err in its analysis of the availability of the private right of action under 42 U.S.C. §1983 and the *Loschiavo* Opinion from the Sixth Circuit does not conflict with this Court's Opinion in *Suter* for the above stated reasons.

III.

THE COURT OF APPEALS DID NOT ERR IN STATING THAT REASONABLENESS IS EASILY SUSCEPTIBLE OF JUDICIAL EVALUATION AND IT MADE PROPER EVALUATION OF THE REASONABLENESS OF DEARBORN'S ORDINANCE.

Petitioners argue that the Court of Appeals for the Sixth Circuit should have evaluated the reasonableness of Dearborn's ordinance before holding it did operate to impose unreasonable limitations on or prevent reception of satellite delivered signals. The argument presented by Petitioner evidences the fact that it does not understand the operation of the FCC Preemption Report and Order.

The District Court in the instant action clearly understood how the Report and Order is to be applied. The *Loschiavo* District Court stated as follows:

> As a threshold issue, then, the regulation will pre-empt an ordinance only if it differentiates between satellite receive-only antenna and other types of antenna facilities. Once such differentiation is shown, then the ordinance survives only by meeting both prongs (a) and (b) above. In denying defendant's motion for summary judgment on this issue, the Court found that the threshold was met, making it necessary to consider both parts of the test. The Court also found that the ordinance has a reasonable and clearly defined health, safety or aesthetic objective, sufficient to meet the first part of the test. However, the Court found that a question of fact remained as to whether the second prong was met. The trial focused on this question.
>
> (Petitioner's Appendix E-3)

The *Loschiavo* District Court after discussing the specific testimony upon which its holding relied, stated as follows:

> Subsection (b) of the regulation can be broken down into three parts: 1) an ordinance may not impose unreasonable restrictions on reception; 2) an ordinance may not prevent reception; and 3) an ordinance may not impose excessive costs upon users.
>
> (Petitioner's Appendix E-3-4)

The *Loschiavo* District Court then set forth the testimony upon which its holding relied and then stated as follows:

> Based upon this testimony, the Court finds that the ordinance unreasonably restricts reception in violation of the FCC regulation because it contains no express provisions for variances for dishes on property where satellite site lines are blocked. The provision allowing additional uses where they are 'in harmony with the character of the district' is inadequate because it balances

> aesthetic concerns with the right to reception. While the city's aesthetic concerns are legitimate and plaintiffs' satellite dish definitely could be considered aesthetically displeasing, this court is bound by the legislative intent of the FCC to forbid unreasonable restrictions on reception. The court cannot balance this intent with aesthetic concerns. The regulation absolutely entitles plaintiffs to be free of unreasonable restrictions on reception. Although the ordinance may be valid as to properties on the south side of the city, where site lines to satellites are direct, nowhere on plaintiffs' property could they erect a dish in compliance with the ordinance and receive reasonable reception. Therefore, the ordinance is pre-empted by the regulation and is unenforceable, as applied to this case and generally, unless the city makes provisions to accommodate situations where surrounding structures make it impossible to erect a dish that complies with the ordinance and receives reasonable reception.
>
> (Petitioner's Appendix E-5)

The Court of Appeals for the Sixth Circuit affirmed the reasonableness issues as addressed by the District Court. As such, Dearborn's contention that it "remains an unanswered question of law whether Dearborn's ordinance violates this regulation" (Petition for *Writ of Certiorari*, at p. 11) was clearly decided by the District Court and affirmed by the Court of Appeals.

The Court of Appeals for the Sixth Circuit made the following findings with regard to the reasonableness issue raised by the FCC Report and Order:

> A regulation is not rendered impermissibly vague simply because it calls for a judicial determination of 'reasonableness.' See *Wilder*, 496 U.S. at 520; 110 S. Ct. at 2523. (inquiry into

> reasonableness of Medicaid reimbursement rates is 'well within the competence of the judiciary'); *Wright*, 479 U.S. at 432, 107 S. Ct. at 774 (interpreting 'reasonable' utility allowance). Instead, as the Supreme Court has recognized, Courts are competent to interpret each statute or regulation by its own terms, considering the provision 'in light of the entire legislative enactment.' *Suter*, ___ U.S. at ___ & n. 8, 112 S. Ct. at 1367 & n. 8. Here, the legislative history of the 1984 Act makes clear that Congress amended Section 605(b) of the Communications Act to promote individual access to diverse satellite programming. To further this goal, the FCC adopted Section 25.104, which provides unambiguous notice to local governments that zoning ordinances cannot frustrate the reception of satellite signals for home viewing. Given the straightforward nature of this provision, particularly when considered in light of the purpose of the 1984 Act, we are confident that the reasonableness standard is readily susceptible of judicial evaluation. See also *Preemption of Local Zoning*, 51 Fed. Reg. at 5524 (FCC considers it 'within the ability of the Court to make legal determinations of reasonableness or excessiveness')

Loschiavo, 33 F.3d at 552-553. (Petitioner's Appendix A-8-9)

Certainly the Courts in other satellite reception antenna cases have been able to address and decide the reasonableness issue. See *Village of Elm Grove v. Py*, 724 F. Supp. 612 (E.D. Wis. 1989); *Alsar Technology v. Zoning Board of Adjustment*, 235 N.J. Super. 471, 563 A.2d 83 (N.J. Super L. 1989); *Cawley v. City of Port Jervis*, 753 F. Supp. 128 (1990); *Kessler v. Town of Niskayuna*, 774 F. Supp. 711

(N.D.N.Y. 1991); and *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024 (D.N.J. 1988).

Petitioner next suggests that the test for reasonableness with regard to Dearborn's Ordinance No. 81-33, §501(e) should not be whether it is unreasonable for a particular individual, but whether it is unreasonable generally. In support of this argument, Petitioner cites *Pennell v. City of San Jose*, 485 U.S. 1 (1988). Initially, a *Pennell* type test does not apply in the instant action, as the FCC Report and Order itself provides each individual with the unfettered right to receive satellite signals. This intent of the FCC and the right thereby created could not possibly function under the test which Petitioners claim *Pennell* sets forth.

Furthermore, *Pennell* is inapplicable to the instant action. *Pennell* examines a rent control ordinance under the takings clause. The issue involved is a rent control ordinance which allowed a reasonableness analysis with regard to the hardship of the tenant. The argument was that this reasonableness analysis amounted to a taking in a case where rent determined under objective factors was lowered after the reasonableness analysis. This Court in *Pennell* held that the taking issue was premature. *Pennell*, 485 U.S. at 9. Furthermore, under the equal protection and due process arguments presented, this Court examined those arguments in terms of "carefully considering both the individual circumstances of the landlord and tenant." *Pennell*, 485 U.S. at 13-14. *Pennell* does not say what Dearborn purports. There is no conflict between *Pennell* and the Opinion of the Sixth Circuit Court of Appeals in *Loschiavo*.

A close review of the District Court holding establishes that the Court did take both a specific view of the

Loschiavo situation and a global view of how the Ordinance dealt with varying site line situations throughout the City. The District Court noted: "[T]he Ordinance contains no express provisions for variances where houses, garages, trees, fences, etc. block the sight lines necessary for satellite transmission." (Petitioner's Appendix E-4)

In other words, the Ordinance was inflexible to the needs of satellite signal reception and set forth no guidelines for the Zoning Board to allow height and location variances from the literal terms of the Ordinance. For that reason that the Dearborn Ordinance was unreasonable *generally* and Petitioner's argument is therefore without merit.

IV.

THE NINTH CIRCUIT'S ANALYSIS IN *HOWARD v. BURLINGAME*, 937 F.2d 1376 (9th Cir. 1991) OF THE FCC REGULATION APPLICABLE TO AMATEUR RADIO ANTENNAS, DOES NOT APPLY TO OR CONTROL DISPOSITION OF RESPONDENTS 42 U.S.C. §1983 CLAIMS FOR ENFORCEMENT OF THEIR RIGHTS UNDER 47 C.F.R. §25.104 CONCERNING SATELLITE RECEPTION ANTENNAS.

Contrary to Dearborn's contention, it is not foreseeable that the decision in the *Loschiavo* case will impact upon local regulation of amateur radio antennas. Amateur radio antennas are dealt with by the FCC under a separate federal regulation designated as PRB-1, which is reproduced in Petitioner's Appendix G.

In fact, the quote at PRB-1 at p. 12 of the Petition evidences the fact that the preemption under PRB-1 is limited and leaves total discretion to localities as opposed to the mandatory preemption set forth under the Report and Order dealing with satellite reception antennas.

Dearborn makes gratuitous statements regarding the comparability of PRB-1 to 47 C.F.R. §25.104, stating that there is "really no difference between the preemption set forth in PRB-1 and the preemption set forth in 47 C.F.R. §25.104." (Petitioner's *Writ of Certiorari* at p. 13) A fair reading of both regulations belies Dearborn's interpretation. Dearborn relies on *Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991) as the cornerstone of its argument.

The Court of Appeals for the Sixth Circuit in the instant case properly distinguished *Howard v. City of Burlingame* as follows:

> We also find that there is sufficient mandatory language in the FCC's regulation to create a binding obligation on the City of Dearborn. In unequivocal terms, Section 25.104 provides that local regulations such as Dearborn Zoning Ordinance No. 81-33, §501-e 'are preempted' if they unduly limit satellite reception or impose excessive costs on satellite antenna users. 47 C.F.R. §25.104. While acknowledging that local governments have traditionally maintained a strong interest in zoning matters, the regulation explicitly preempts all zoning ordinances that improperly trammel on individual's right to satellite reception. *Id.*; compare *Howard v. City of Burlingame*, 937 F.2d 1376, 1380 (9th Cir. 1991) (recognizing that FCC declaratory ruling PRB-1 refused to preempt local regulations, requiring instead only a 'reasonable accommodation' between the antenna height desired by the amateur radio operators and 'the legitimate interests of the local governments in regulating local zoning matters').

Loschiavo, 33 F.3d at 552. (Petitioner's Appendix A-7)

Contrary to Dearborn's contentions, the Court of Appeals for the Ninth Circuit described the provisions of PRB-1 as follows: "The language of PRB-1 itself confers only in limited federal preemption, and promotes the federal interest in amateur radio operations rather than an individual operator's right to erect the antenna of his or her choice". *Howard*, 937 F.2d at 1380. The Court in *Howard* also noted the following: "The text of the Federal Communications Act nowhere mentions any right to erect antennas for ham radio transmissions, nor does it purport to create binding obligations on local governments to allow antennas of any particular height." *Howard*, 937 F.2d at 1379.

Clearly, the Court of Appeals for the Sixth Circuit properly distinguished *Howard* and PRB-1 on the basis that they were not comparable to the mandatory preemption as set forth in 47 C.F.R. §25.104.

V.

THIS CASE IS NOT A LAND USE DISPUTE WHICH SHOULD BE LITIGATED IN THE STATE COURT.

Dearborn in its fourth argument suggests that this case should not have been litigated in the Federal Courts. This argument chooses to ignore that many cases regarding this very same issue have been litigated in the Federal Courts. Furthermore, they have been properly litigated in the Federal Courts under federal question subject matter jurisdiction. Plaintiffs are not required to exhaust other remedies prior to bringing a cause of action under §1983. *Cawley v. City of Port Jervis*, 753 F. Supp. 128, 131 (1990) (Citing *Patsy v. Board of Regents*, 457 U.S. 496 (1982)). The *Cawley* Court also states: "Any person whose rights under FCC regulations have been denied by a local governmental body has a cause of action under 42 U.S.C. §1983."

Cawley, 753 F. Supp. at 130 (Citing *Van Meter v. Township of Maplewood*, 696 F. Supp. 1024, 1027 (D.N.J. 1988); *Alsar Technologies, Inc. v. Zoning Board of Adjustment*, 235 N.J. Super. L. 471, 563 A.2d 83, 91 (1989); and *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989)).

Furthermore, this Court has acknowledged the ability of Federal Government to preempt state laws in *City of New York v. FCC*, 486 U.S. 57 (1988). This Court stated as follows:

> When the Federal Government Acts within the authority it possesses under the Constitution, it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes. The Supremacy Clause of the Constitution gives force to federal action of this kind by stating that the 'Laws of the United States which shall be in Pursuance' of the Constitution 'shall be supreme Law of the Land.' U.S. Const., Art. IV, cl. 2. The phrase 'Laws of the United States' encompasses both federal statutes themselves and *federal regulations that are properly adopted in accordance with statutory authorization*. For this reason, at the same time that our decisions have established a number of ways in which Congress can be understood to have pre-empted state law, see *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355, 368-369 (1986), we have also recognized that 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation' and hence render unenforceable state or local laws that are otherwise not inconsistent with federal law. *Id.* at 369. (Emphasis added)
>
> *City of New York*, 486 U.S. at 63-64.

After suggesting that this is not a proper issue to be litigated in Federal Courts, Dearborn discusses the specific state remedy which it claims exists with regard to appeals of decisions from local zoning boards in the State of Michigan. It is noteworthy at the outset that this is only the second time which Dearborn has raised this argument. The first time was in its Petition for Rehearing *En Banc* to the Court of Appeals for the Sixth Circuit. These issues were not raised in its Motion for Summary Disposition in the District Court, at trial or in post-trial pleadings. Federal Court jurisdiction and exhaustion of state law remedies was not raised in briefs filed in the Sixth Circuit Court and was not discussed at oral argument. The issue therefore is not properly before this Court.

Dearborn in its Petition for *Writ of Certiorari* blends its argument regarding a specific state law remedy into its discussion of *Parratt v. Taylor,* 451 U.S. 527 (1981). Dearborn's very broad conclusion after its limited analysis of *Parratt* is that *Parratt* effectively bars causes of action under 42 U.S.C. §1983 where clear and comprehensive state law remedies exist. A careful review of *Parratt* establishes Dearborn's argument to be flawed.

First, the factual scenario under which this Court decided *Parratt* is far from similar to the instant action. *Parratt* involved an inmate at a Nebraska penal and correctional complex who had ordered certain hobby materials with a value of $23.50. Due to the negligence of employees at the prison, the hobby materials were lost. The inmate brought suit in Federal Court under 42 U.S.C. §1983 alleging jurisdiction under 28 U.S.C. §1343, which contains no minimum dollar limitation. The inmate's claimed deprivation under 42 U.S.C. §1983 was a Fourteenth Amendment claim for deprivation of property

without due process of law. *Parratt*, 451 U.S. at 529. In order to determine whether there was a deprivation of a constitutional right under §1983, this Court analyzed the inmate's Fourteenth Amendment due process claim. The conclusion of this Court with regard to the Fourteenth Amendment claim was as follows:

> Application of the principles recited above to this case leads us to conclude the respondent has not alleged a violation of the Due Process Clause of the Fourteenth Amendment. Although he has been deprived of property under color of state law, the deprivation did not occur as a result of some established state procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the state to provide a predeprivation hearing.
>
> *Parratt*, 451 U.S. at 543.

Thus, the 42 U.S.C. §1983 claim failed because the Court believed the inmate had not been deprived of any rights, privileges or immunities secured by the constitution or laws of the United States, a requirement to sustain a §1983 action. Dearborn's argument collapses the holding in *Parratt* to conclude that because there was an adequate state law remedy, the §1983 action was not available. The adequate state law remedy to redress the damages was part of the deprivation analysis under the due process claim under the Fourteenth Amendment. It is because there was no denial of due process that there was no deprivation to sustain a 42 U.S.C. §1983 claim. As such, Dearborn has erroneously suggested to this Court that *Parratt* is controlling in the instant action.

Dearborn next suggests to this Court that the Court of Appeals for the Sixth Circuit decision results in foreclosure of any ability of a municipality to create an ordinance with regard to satellite dish antennas. This is simply not the case. Restrictions are permissible, they just cannot unreasonably restrict or preclude reception, or impose cost burdens that are excessive in light of the cost of the installation itself. Within such limits, the municipality's health, safety and aesthetic concerns can and should be addressed. However, there must be flexibility on the part of the municipality. Blanket restrictions that dishes may not exceed twelve feet in height above grade are inflexible and unreasonable when reception would be entirely blocked by trees or buildings if the dish cannot be elevated above twelve feet. This is precisely what the Report and Order seeks to stop. As the *Loschiavo* District Court implied it is incumbent upon municipalities to draft ordinances which contain express provisions and guidelines for permissible alternatives for dishes on property where satellite lines are blocked. (Petitioner's Appendix E-5)

Finally, Dearborn, on the one hand, argues that it does not want to see a carte blanche for satellite antenna users, which it claims the FCC declined to provide in 47 C.F.R. §25.104, and then uses in support of its contentions statements taken out of context from Commissioner Mimi Weyforth Dawson's dissent in part from the Report and Order. It is clear that Dearborn did not completely read the dissent of Commissioner Dawson, as a complete reading clearly shows that Commissioner Dawson favored complete and total preemption of all local zoning ordinances with regard to satellite dish antennas. The following statements made by Commissioner Dawson in her dissent evidence her opinion of this issue:

> While I am sympathetic to localities' traditional role in use planning, this is not purely a local issue. It involves the right of individuals, as guaranteed by the First Amendment and the Communications Act, to receive interstate communications. As Senator Goldwater said in introducing S.R. 35, 'as a political conservative, I believe that each State possesses broad authority and responsibility on a wide range of subjects. However, the basic question here is not Federal preemption of local powers. It is whether cities and counties can thwart a clear national policy which has been repeatedly enunciated by the Congress and the FCC to encourage the development of new communications technologies and services in the public interest.' 31 Cong. Rec. 5357 (January 3, 1985, statement of Sen. Goldwater).

Preemption of Local Zoning, 51 Fed. Reg. at 5527. (Petitioner's Appendix F-14)

The Court of Appeals for the Sixth Circuit properly considered all necessary prongs under the 42 U.S.C. §1983 claim and properly reversed the District Court's findings with regard to same.

VI.

THE DECISION OF THE COURT OF APPEALS DOES NOT RADICALLY ENLARGE THE SCOPE OF 42 U.S.C. §1983.

Individuals have a cause of action under 42 U.S.C. §1983 when the conduct complained of was committed by a person acting under color of state law; and when the conduct deprived a person of rights, privileges or immunities secured by the constitution or the laws of the United States. 42 U.S.C. §1983. The first element is not at issue in this action. The second element is at the heart of

this case. The Court of Appeals for the Sixth Circuit properly relied upon *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990) in its analysis of the Report and Order under the §1983 test. The *Wilder* analysis has three elements, to-wit:

(1) Did congress intend that the subject provision benefit the Plaintiff;

(2) If so, does the provision create a binding obligation on the governmental unit rather than merely "congressional preference"; and

(3) Is the interest asserted sufficiently clear that it may be judicially enforced. (Quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989).

Wilder, 496 U.S. at 509.

The Report and Order was held to have created a federal right under the *Wilder* test by the Court of Appeals for the Sixth Circuit after full analysis of all three prongs. *Loschiavo*, 33 F.3d at 552-553. Dearborn's general policy argument is not strong enough to overcome the results reached under the *Wilder* test.

Dearborn also contends the Sixth Circuit's decision conflicts with other Sixth Circuit Opinions, including a 1978 case *Studen v. Beebe*, 588 F.2d 560 (6th Cir. 1978). Unfortunately, Dearborn mischaracterizes the holding in *Studen*. First, the factual basis for *Studen* involves a village ordinance which rezoned substantial acreage from a three-tiered zoning area into a single family residence use. The claims made by the land owner under 42 U.S.C. §1983 were based upon a denial of due process and equal protection. The Sixth Circuit held in agreement with the District Court that the land owner Appellants had failed to establish denial of due process, and thus they failed to

establish a denial of a federal right, privilege or immunity, and were therefore precluded from success on the §1983 action. The Loschiavos agree with *Studen* in that §1983 does not create a federal cause of action for every wrong committed under the color of state law. *Studen*, 588 F.2d at 566. However, in the instant case there is a cause of action under §1983 because all elements of the *Wilder* test have been met.

Furthermore, *Studen* is not applicable to the instant action, which is not a zoning dispute, but rather involves attempted enforcement of an ordinance which is preempted by the FCC because it differentiates between satellite reception antennas and other types of antennas, and does not meet the second prong of the mandatory two prong test. The federal right at issue here is the right to receive satellite signal communications by individual citizens through the use of satellite reception antennas. This right was introduced by Congress in its amendment to 47 U.S.C. §605 and the regulation thereafter adopted by the FCC to enforce the statutorily created policies and rights.

The *Studen* decision can best be summed up by the following:

> Litigants cannot create federal jurisdiction by filing an insubstantial action under the civil right statutes. *Burnett, supra*, 565 F.2d at 400. Only deprivations of rights, privileges, or immunities secured by the Constitution and the laws of the United States are actionable. *Ohio Inns, supra*, 542 F.2d at 679.
>
> . . . .
>
> The record in the present case reveals no deprivation of any rights, privileges or immunities secured by the Constitution or any laws of the United States.
>
> *Studen*, 588 F.2d at 566.

The Sixth Circuit Court of Appeals proper analysis of this issue led to a conclusion that there is a deprivation of a right secured by the laws of the United States, and as such a private right of action under 42 U.S.C. §1983 exists.

CONCLUSION

There is no conflict between the Sixth and Ninth Circuits as the Ninth Circuit did not address whether a private right of action under 42 U.S.C. §1983 exists to enforce rights under 47 C.F.R. §25.104. This writer has found no other circuit opinions discussing this issue.

Second, the Court of Appeals, after lengthy analysis under the *Wilder* test determined that 47 C.F.R. §25.104 created an enforceable right under 42 U.S.C. §1983.

Third, the Court of Appeals properly evaluated the reasonableness of the Dearborn Ordinance. It reviewed the factual findings of the District Court finding no error regarding the unreasonable limitations the Dearborn Ordinance placed on reception.

Fourth, the Court of Appeals properly determined that *Howard v. City of Burlingame*, 937 F.2d 1376 (9th Cir. 1991) dealing with FCC Regulation, PRB-1, was distinguishable and inapplicable to a 42 U.S.C. §1983 claim for impairment of the rights conferred under 47 C.F.R. §25.104.

Fifth, the instant action involves mandatory federal preemption under 47 C.F.R. §25.104 of state and local laws which discriminate against satellite reception antennas. This cause is within the jurisdiction of the Federal Courts under federal question jurisdiction. Further, available state law remedies need not be exhausted before a claim under 42 U.S.C. §1983 can be brought for deprivation of rights under 47 C.F.R. §25.104.

Lastly, the Court of Appeals did not radically enlarge or depart from the intent of 42 U.S.C. §1983 as they sustained the Loschiavos' claim under §1983 only after finding that all prongs of the *Wilder* test had been met.

For all of these reasons, it is requested that this Honorable Court deny Dearborn's Petition for *Writ of Certiorari*.

Respectfully submitted,

WILLIAMS, SCHAEFER, RUBY & WILLIAMS, P.C.

JOHN W. GRIFFEN, JR. (P14375)*
LISA SYMULA-NAHIKIAN (P41171)
KRISTINE L. COOK (P49748)
Attorneys for Respondents
380 North Woodward Avenue, Suite 300
Birmingham, Michigan 48009
(810) 642-0333

**Counsel of Record*

Dated: January 9, 1995

No. 94-1040

In The

Supreme Court of the United States

October Term, 1994

CITY OF DEARBORN,

Petitioner,

vs.

RONALD LOSCHIAVO and
DONNA LOSCHIAVO, his wife,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

APPENDIX TO BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 25

[CC Docket No. 85-87; FCC 86-28]

Common Carrier Services; Preemption of Local Zoning and Other Regulation of Receive-only Satellite Earth Stations

AGENCY: Federal Communications Commission.

ACTION: Report and Order.

SUMMARY: This action adopts a final rule stating Commission policy with respect to federal preemption of local regulation of satellite earth stations. This rule is necessary to ensure that non-federal regulations do not interfere unreasonably with the federal right to construct and use antennas to receive satellite delivered signals. Under this rule, non-federal regulations which differentiate in their treatment of satellite earth stations are preempted unless they have a valid health, safety or aesthetic objective and do not impose unreasonable limitations on reception. Regulation of transmitting antennas is similarly preempted except that non-federal health and safety regulation is not preempted.

EFFECTIVE DATE: March 14, 1986.

ADDRESS: Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554.

FOR FURTHER INFORMATION CONTRACT:
Rosalee C. Gorman, (202) 634-1781.

SUPPLEMENTARY INFORMATION:

List of Subjects in 47 CFR Part 25

Communications common carriers, communications equipment, Radio, Satellites.

Report and Order

In the matter of Preemption of Local Zoning or other Regulation of Receive-Only Satellite Earth Stations (CC Docket No. 85-87).

Adopted: January 14, 1986.
Released: February 5, 1986.

By the Commission: Commissioner Dawson dissenting and issuing a statement.

I. Introduction

1. On March 28, 1985 the Commission issued a *Notice of Proposed Rulemaking (Notice)*[1] stating its initial determination to adopt a rule preempting certain state and local zoning or other regulations of satellite receive-only antennas.[2] We have received extensive comments on a wide variety of issues raised in connection with this

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[1] Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations, 50 FR 13966 (April 9, 1985).

[2] This action was taken in response to a Petition for Declaratory Ruling filed by United Satellite Communications, Inc. Because of the significant local interest in the issues involved and due to the limited record compiled, especially with respect to the views of local governments, we issued a Notice of Proposed Rulemaking soliciting further comments.

proceeding and are now in a position to adopt a final rule. The rule we are adopting is:

State and local zoning or other regulations that differentiate between satellite receive-only antennas and other types of antenna facilities are preempted unless such regulations

(a) Have a reasonable and clearly defined health, safety or aesthetic objective; and

(b) Do not operate to impose unreasonable limitations on, or prevent, reception of satellite delivered signals by receive-only antennas or to impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment.

Regulation of satellite transmitting antennas is preempted in the same manner except that state and local health and safety regulation is not preempted.

2. This rule differs from that originally proposed[3] reflecting modifications made in response to the comments submitted.[4] Due to the large number of documents

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[3] The proposed rule read as follows: "State and local zoning or other regulations that discriminate against satellite receive-only antennas in favor of other communications facilities are preempted unless they have a direct and tangible relationship to reasonable, valid, demonstrable and clearly articulated health, safety or aesthetic objectives and constitute the least restrictive method available to accomplish such objectives."

[4] Several parties have made specific alternative rule proposals. Although none of these suggestions has been adopted in full, aspects of these proposals have been adopted in full, aspects of these proposals have been incorporated in our final

filed in this matter,[5] we will not discuss each individually. However, all parties' suggestions have been fully considered.

3. In making our initial proposal, we determined that we had the legal authority to preempt[6] and that a limited preemption of state and local zoning regulation was warranted.[7] The objective of the *Notice* was to solicit comments on the implementation of such a preemption, recognizing our obligation to ensure that federal communications policies are not frustrated while also acknowledging the strong, non-federal interest in land use regulation.[8]

II. Comments

A. Authority to Preempt

4. Commenters in agreement with our decision to preempt analyzed precedent supporting such Commission action.[9] Preemption, according to proponents, is

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action. *See, e.g.*, Comments of RCA Communications, Inc. (RCA), Hughes Communications, Inc. (Hughes), and Satellite Television Industry Association, Inc. (Space).

[5] Approximately 170 comments were filed in this proceeding in addition to many informal letters indicating interest and over 2000 postcards supporting preemption. A list of the commenters is attached as Appendix A.

[6] *Notice* at paras. 9-21.

[7] *Id.* at para. 30.

[8] *Id.* at para. 17.

[9] *See e.g.*, Comments of Hughes, Space, Cable Com. Corp.

fully consistent with Commission policy, has been sustained in court challenges,[10] and is not limited to cases in which discrimination is found.[11]

5. Parties opposing preemption[12] argued that the federal interest in the availability of satellite-delivered service is insufficient to rebut the presumption of validity which attaches to local regulation of traditionally local matters.[13] The League stated that municipal regulation does not directly affect the availability of Commission licensed satellites. Where alternative methods to receive video entertainment programming exist, (i.e. cable television, direct broadcase [sic] satellites, multipoint distribution systems), a federal preemption allowing the unregulated proliferation of satellite antennas where no fee is paid for programming will hurt these other services by depriving them of revenue which will in turn hurt the satellite industry by affecting its financial base.[14] The

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[10] Comments of SPACE, Curtis Mathes Corp./Southern Satellite Systems, Inc./Spectrodyne, Inc. (Curtis Mathes), RCA.

[11] Comments of Brooks Satellite, Inc. at 4.

[12] At the suggestion of the National League of Cities (League), many cities stated objections to our proposed preemption. These were (1) the action is an improper federal interference in traditionally local matters; (2) the Commission does not have authority to preempt under the Communications Act; (3) local law provides adequate remedies; (4) preemption would impose unreasonable administrative burdens on states and localities. *See, e.g.*, Comments of Manhattan Beach, Ca.

[13] Space contends that this assertion is incorrect because the lawfulness of preemption action depends upon the impact local regulation has on federal objectives and not on the degree of local interest. Space comments at 6.

[14] League Comments at 5.

League argues that by eliminating local regulation the Commission may harm rather than advance its federal objective.

6. Section 705 of the Communications Act 47 U.S.C. 705, according to the League, creates only a limited "sanction" of reception of satellite delivered programming. Brooks Satellite, Inc. (Brooks), in contrast, calls section 705 rights "unequivocal" and "fundamental."[15] The League would limit the application of a case relied upon for preemption authority[16] on the basis of the "unique characteristics of MDS" where entry regulation was preempted because a reduction of reception points in one state placed a burden on interstate commerce.[17]

7. The McLean Citizens Association (McLean Citizens) stated that the cases relied on as precedent for Commission preemption were inapplicable because they involved state regulation of entry by new communications services. Comments filed by United States Satellite Broadcasting Co., Inc. (USSB), although favoring preemption, cautioned that the Commission must take care to respect the "legitimate land use concerns of state and

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[15] Comments of Brooks at 11.

[16] In the Matter of Orth-O-Vision, Inc., 69 FCC 2d 657 (1978), *aff'd sub nom.* New York State Commission on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982) (Ortho-O-Vision). The League does not comment on our order in Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983), *aff'd sub nom.* New York State Commission on Cable Television v. FCC, 749 F. 2d 804 (D.C. Cir. 1964) (Earth Satellite) which preempted state regulation of SMATV systems where signals were delivered by satellite.

[17] League comments at para. 4.

local governments." USSB agreed with McLean Citizens that there is a distinction between federal preemption authority exercised under the Interstate Commerce Clause when the regulations are economic as opposed to based on state police powers. It stated that the Commission should try to harmonize its rule with legitimate zoning enactments[18]

8. The League also asserted that the record before the Commission does not establish the existence of a problem and that therefore Commission action is unjustified.[19] Other parties disagreed, offering examples of ordinances which would violate the proposed preemption rule, detailing individual problems with restrictive zoning, and citing cases in which a denial of an application to install an antenna was sustained by court action, thus preventing the reception of programming.[20]

9. A final objection by the League is that the Commission's preemption will result in a significant amount of litigation and necessitate review by either the Commission or the courts. Because the proposed rule's standards are vague, judicial review would result in inconsistencies

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[18] USSB cited Hybud Equipment Corp. v. Akron, 645 F.2d 1187, 1194 (6th Cir. 1961) in support of this proposition. The constitutional basis of the Communications Act is the Interstate Commerce Clause.

[19] League Comments at 11 quoting Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir. 1977).

[20] Space comments at 5-8; USSB Comments at 1-3. Other parties' comments described particular difficulties that individual companies have encountered. *See, e.g.*, Comments of Atlantic Satellite, Spectradyne, American Satellite, District Broadcast Satellite Association, Curtis Mathes.

and agency review would impose extraordinary burdens on the Commission and on local authorities. Space replied that the adoption of a national standard would reduce litigation and encourage accommodation of disputes between antenna users and communities.[21]

B. Implementation of Rule

10. Most parties, whether in favor of, or opposed to, preemption, offered suggestions with respect to the scope of the specific rule to be adopted. Many believed that requirements of the rule were vague and unclear and stated that it did not offer sufficient guidance to local communities[22] or would not be susceptible to application in specific cases.[23]

11. Some commenters suggested that the "discrimination" requirement be stricter and invalidate any regulation that discriminates in effect as well as on its face.[24] Others asserted that the phrase "in favor of other communication facilities" be deleted because this created a harder burden for those challenging local action.[25] Several parties suggested deleting the entire discrimination

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[21] Reply Comments of Space at 8-9.

[22] Comments of American Planning Association (APA), Mutual Broadcasting System, Inc.

[23] Comments of National Satellite Cable Association and Hughes.

[24] Comments of USSB at 3.

[25] Comments of Equatorial Communication Services [Equatorial] and Associated Press.

requirement, stating that the proper focus of preemption should be on the effect of the local regulation on federal objectives and not on differences in treatment.[26]

12. It was also urged by opponents that we delete the "least restrictive means" test. They claimed that requiring the least restrictive alternative would prevent zoning for legitimate objectives such as historical preservation.[27] Space argued that the least restrictive means test was consistent with first amendment requirements where local regulations were restricting constitutionally protected communications.[28]

13. Several cities and representative groups stated that the proposed rule's general exception for ordinances enacted pursuant to police power objectives was duplicative as general zoning law requires that regulations be based on legitimate health, safety or, in some cases, aesthetic objectives.[29] They asserted that such a rule was thus unnecessary. Some preemption advocates also objected to this criterion because it would allow circumvention of the discrimination requirement by creating multiple

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[26] Comments of Curtis Mathes, Cablecom and Hughes, *Contra*, Comments of M/A Com and Equatorial urging that a clear stand be taken against discrimination.

[27] Comments of National Trust for Historic Preservation. *See also* Comments of National Capital Planning Association.

[28] Comments of Space at 12-15.

[29] *See* Comments of APA. *See also* Reply Comments of Space at 13. Comments of the National Capital Planning Commission at 7 requested the inclusion of "security" as a criteria but did not elaborate.

loopholes.[30] SPACE asked that any aesthetic zoning power be limited to "bona fide historic districts" that also restrict other "accoutrement or modern living."[31] American Satellite suggested that any health hazard relied upon by local authorities be required to be documented.[32]

14. Some commenters suggested preemption guidelines based on size and land use characteristics of the proposed antenna site. For example, the International Association of Satellite Users and Suppliers [IASUS] proposed an absolute preemption for construction in industrial, commercial and high density areas as well as for antennas of less than 3.5 meters with a limited preemption allowing non-aesthetically based regulation of antennas over 3.5 meters in low density single family zones.[33]

C. *Alternative Approaches*

15. The APA asserts that the Commission should avoid the vagueness of the proposed rule by exercising preemption on a case-by-case basis and only in those

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[30] Comments of International Association of Satellite Users and Suppliers at 6.

[31] Comments of Space at 17. Cable Com. Corp. at 7 suggested eliminating aesthetics as an acceptable local objective.

[32] Comments of American Satellite at 1.

[33] *See also* Comments of M/A Com. Brooks, USSB, Sat Time Inc., Direct Broadcast Satellite Association (DBSA) and National Association of Broadcasters (NAB) with respect to suggested size criteria. *Cf.* Comments of Contemporary Communications Corp. which cautioned against emphasis on size or physical characteristics of antennas.

instances where one communications technology is favored over another. Although acknowledging that the Commission's administrative burden might be increased under this approach, the APA maintained that there would only be a few cases of egregious discrimination necessitating review.[34]

16. Many parties supporting preemption action urged that any final rules be extended to transmitting as well as receiving antennas despite our tentative decision to limit consideration to the latter.[35] The rationale offered for this suggestion is that many smaller transmitting antennas are not visually or otherwise different from receive-only facilities and thus should not be subject to discriminatory local regulation.[36] These commenters [sic] argue that the record established in this proceedings is sufficient to justify Commission action with respect to transmitting antennas.[37] It was also suggested that the

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[34] Comments of APA at 9. Many cities agreed with APA's recommended approach. *See e.g.* Cincinnati, Ohio; Tuscaloosa, Ala; Warwick, R.I. *See also* Comments of David Preece.

[35] *See e.g.*, Comments of Equatorial; Hughes; IASUS; RCA; Public Broadcasting Service (PBS); Satellite Business Systems (SBS); M/A Com; Atlantic Satellite; Sat Time, Inc. *See also* Comments of Contemporary Communications Corp. which urged extension to all telecommunications antennas.

[36] Comments of PBS. *See also* Comments of RCA which suggest a presumption against local regulation of antennas under 2 meters in order to encourage construction of small antenna business networks to operate in the 12/14 GHz frequency bands.

[37] *See* Reply Comments of PBS.

Commission, by establishing the ANSI standards for regulation of radiation levels of transmitting equipment, has already preempted local control for health objectives.[38]

17. Other parties asserted that because we had stated a tentative conclusion to limit the rule under consideration to receive-only antennas, a new rulemaking might have to be established to consider preemption of local regulation of transmit antennas.[39]

18. Parties on both sides of the issue requested that in addition to, or instead of, a general rule, we should give examples of those ordinances or regulations that would be acceptable under our preemption standards.[40] Space, however, cautioned that such an approach was inadvisable because in limiting our rule with such examples, a wide variety of "local abuses" would not be properly addressed.[41]

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[38] *See* Comments of Atlantic Satellite citing LIMA Partners vs. Northvale, Docket No. L-17049-84 P.W. (Superior Court of New Jersey, Law Division, Bergen County, May 10, 1985) where a state court reached this conclusion.

[39] *See* Comments of NAB, Atlantic Satellite has filed a petition requesting the establishment of a separate rulemaking to consider preemption of local regulation of satellite transmitting antennas. RM-5021.

[40] *See* Comments of National Capital Planning Association at 8; Curtis Mathes at 5.

[41] Comments of Space at 13.

D. Other Issues

19. The League suggested that our preemption action would violate both the National Environmental Policy Act (NEPA) and the Regulatory Flexibility Act.[42] With respect to the former, it stated that under NEPA standards, the Commission is obligated to consider the authorization of an antenna over 30 feet in diameter or those to be built in an historic or scenic area a major action requiring an environmental impact statement.[43] The League contended that a similar approach is required in adopting a final preemption rule. Space, however, states that because the Commission is not authorizing any construction here and because the receive-only antennas under consideration are not required to be licensed, there is no inconsistency with NEPA. In addition, receive-only antennas usually do not approach thirty feet in height or diameter and therefore even if this rulemaking were an NEPA defined "action," no environmental policies have been implicated.[44]

20. The League also asserts that the *Notice* did not comply with the Regulatory Flexibility Act.[45] According to the League, we did not consider alternative approaches

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[42] 42 U.S.C. 4321 *et seq.*; 5 U.S.C. 601 *et seq.*

[43] Comments of League at 17.

[44] Reply Comments of Space.

[45] Comments of League at 18. We are considering this issue raised by the League's comments despite the fact that it failed to submit separate comments directed to our initial Regulatory Flexibility Analysis as required by paragraph 34 of our *Notice*.

such as exempting small cities from preemption or allowing any compliance with our rules to be voluntary. Space disagreed, asserting that any exemption for small jurisdictions would circumvent Commission objectives in proposing a uniform regulatory policy. In addition, the rule would not impose any new record keeping or other additional administrative filing requirements on small cities, a determination which was made in our Initial Regulatory Flexibility Statement.

21. The National Trust for Historic Preservation (Trust) stated that the Commission illegally ignored the provisions of the National Historic Preservation Act by failing to consult with the Trust prior to enacting any rule. In addition, the Trust asserted that because historic preservation is also a federal objective, preemption is not authorized.

22. Both the District of Columbia and the National Capital Planning Association asserted that because zoning regulation in the District is promulgated under federal auspices, the Commission cannot preempt these regulations.

III. Discussion

A. Preemption

23. In our *Notice* we concluded that we had the authority to preempt non-federal regulations which stood as obstacles to the accomplishment of federal objectives. We determined that the broad mandate of Section 1 of the Communications Act, 47 U.S.C. 151, to make communications services available to all people of the United States

and the numerous powers granted by Title III of the Act with respect to the establishment of a unified communications system[46] establish the existence of a congressional objective in this area. More specifically, the recent amendment to the Communications Act, 47 U.S.C. 705, creates certain rights to receive unscrambled and unmarketed satellite signals.[47] These statutory provisions establish a federal interest in assuring that the right to construct and use antennas to receive satellite delivered signals is not unreasonably restricted by local regulation.

24. As stated in our *Notice*,[48] when "state regulation stands as an obstacle to the accomplishment of a congressional purpose," such regulation is subject preemption.[49] Our conclusion was that the record showed local and state regulatory interference with established federal objectives and thus some of [sic] preemption was warranted.

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[46] Earth Satellite Communications, Inc., note 16. *supra, citing* General Telephone Co. of California v. FCC, 413 F.2d 390, 396, 401 (D.C. Cir. 1969).

[47] The state court cases cited by the League at pp. 9-10 of its comments for the proposition that the Communications Act does not authorize preemption of zoning involve [sic] questions with respect to height limitations on amateur radio facilities. In this proceeding, we are not preempting reasonable, nondiscriminatory local restrictions. In addition these cases do not involve section 705 rights.

[48] *Notice* at para. 9.

[49] Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984). *See also* Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, 104 S. Ct. 2518 (1984); Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52 (1941).

25. The comments submitted in this proceeding do not support a contrary conclusion and thus our final rule will implement a limited preemption. The arguments offered by commenters opposed to preemption state that a federal objective has not been established because other means of obtaining video programming are available and that a preemption in this proceeding would harm other services.[50] This position ignores the clear statement in our *Notice* that we will not permit a state to arbitrarily favor one particular communications service over another and that local ordinances which engage in arbitrary discrimination will be preempted. The existence of alternative communications media is not a sufficient justification for discriminatory local regulations. In many cases, satellites deliver a wider range of programming than that available over other media such as cable television systems or MDS. Thus, local regulation may deprive local residents of access to the broader range of choices available to antenna users in other parts of the country. In addition, this Commission repeatedly has emphasized its policies to maximize consumer choices by developing a competitive marketplace for the provision of telecommunications goods and services.[51]

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[50] The League claims that cable television systems are the primary method of delivering video programming and that existence of a dual federal-local regulatory scheme for that service precludes preemption action with respect to satellite antennas.

[51] *See e.g.*, Policy and Rules Concerning rates for Competitive Common Carrier Service and Facilities Authorizations Therefore, 95 FCC 2d 554 (1983).

26. If individuals cannot use antennas to receive satellite delivered signals because of discrimination or excessive state and local regulation, their right of access as established by section 705 to interstate communications delivered by satellite will be useless.[52] Whether the use of satellite antennas will cause economic harm to other communications industries is not a proper basis for local regulations that effectively deny citizens direct access to satellites. Such regulations would frustrate our competitive regulatory policies which have been promulgated to provide for a variety of services by consumers. It would be contrary to those policies to permit discriminatory local regulation which reduces the range of choice.

27. The League and most commenting cities[53] have emphasized the traditionally local nature of zoning regulations. We recognized this concern in our *Notice*[54] and it was this factor which resulted in our original conclusion to propose a limited preemption. Despite this recognition, it must be emphasized that the relative importance to states or local jurisdictions of their own laws is not the proper focus in a decision to preempt.[55] The Supreme Court has recently held that a local transit authority was required to comply with the federal minimum wage and

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[52] *See Notice* at para. 10.

[53] *See, e.g.*, Comments of Mankato, Minn.; Aurora, Colo.; Delaware County Planning Dept.

[54] *Notice* at para. 15. *See also* Columbia Plaza Ltd. Partnership v. Cowles, 403 F.Supp. 1337 (D. D.C. 1975).

[55] Free v. Bland, 369 U.S. 663, 686 (1962). *See also* Fidelity Federal Savings and Loan Assoc. v. De La Cuesta, 458 U.S. 141, 153 (1982).

overtime requirements. The transit authority claimed it was immune from federal regulation when operating in areas of traditional local government functions. The court held that "a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' " is unworkable.[56] The same principle applies in this case in that it cannot be argued that preemption is automatically precluded merely because zoning has been called a traditionally local matter.

28. Other parties have questioned our reliance on prior Commission actions that have preempted state regulation of MDS and SMATV systems[57] pointing out that these cases involved non-federal economic regulations and not those promulgated under states' police powers such as zoning.[58] An analysis of cases cited which address this issue, however, demonstrates that the question of preemption authorized under the Interstate Commerce Clause is not dependent on whether the regulation at issue is economic but on whether its effect on interstate commerce is more than "incidental."[59] In this proceeding,

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[56] Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005, 1016 (1985).

[57] Orth-O-Vision, *supra* note 16; Earth Satellite, *supra* note 16. *See* Canton Township v. Brenner, No. 86 CT3551 (35th Dist. Ct. Plymouth, Michigan September 26, 1985) at 10 where the Court stated that the Commission in its Earth Satellite order has already preempted local zoning regulation "to a significant extent."

[58] Comments on McLean Citizens.

[59] Hybud Equipment Corp. v. Akron, 654 F.2d 1187, 1194 (6th Cir. 1981) *citing* Hughes v. Oklahoma 441 U.S. 322 (1979).

the communications delivered by satellite are unquestionably interstate in nature and, as we found in the *Notice*, denial or reasonable access to antenna facilities significantly, not incidentally, interferes with individual rights to receive such communications.

29. An additional contention raised by commenters opposed to preemption is that the existence of a problem has not been sufficiently established to warrant action. However, the volume of comments submitted which detail significant problems with local zoning encountered by antenna users leads to a contrary conclusion.[60] In addition, the existence of cases in which an antenna user was able to obtain a favorable court result is insufficient evidence upon which to base a conclusion that a rule is unnecessary, especially when other cases to the contrary exist.[61] Whether a judicial remedy might be available in some cases and to those who can afford litigation is not determinative of our ability or of the necessity to preempt state regulations when they are obstructing federal objectives.

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[60] *See e.g.*, Comments of Space discussing ordinances of Baltimore, Md., and Gaithersburg, Md. *See also* note 20, *supra*.

[61] For a favorable result, *see* Morgan v. Coral Gables, #83-42783 C.S. 22 (Cir. Ct. Fla. June 18, 1984); Canton v. Brenner, No. 85 CT 3551. For a contrary result, *see* Minars v. Rose, #13686/84. (Special Team, Nassau Co., NY, March 25, 1985); Gouge v. Snellville, 287 S.E.2d 539 (Sup. Ct. Ga. 1982). *See also* Reply Comments of Space at 7-8.

B. Final Rule

30. Most commenters urged that we make adjustments to our final rule that would clarify its requirements and offer more effective guidance to local communities.[62] In formulating the rule adopted here, we have taken into consideration the criticism of our original proposal and to the extent possible in a general policy statement, have made our standard clearer and easier to apply to specific situations.

31. We have retained the criterion that a preemptible regulation must differentiate but have modified the rule to apply only to antenna facilities. This change is based on our conclusion that to require comparable treatment for antennas and cable systems would be unworkable in light of their distinct technologies.[63] This action is not a retreat from our condemnation of ordinances such as that of Chicago which prompted the petition initiating this rulemaking.[64] The Chicago ordinance imposed its

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[62] We adopt USSB's suggestion that our preemption apply to all non-federal action including ordinances, statutes and regulations. In addition, we have received comments filed by Max Dean Parsons which urge extension of preemption to private restrictions such as those found in deed convenants. This issue was not raised in our *Notice* and raises some issues not presented in a consideration of local governmental action. We decline to rule on it in this proceeding and deny the request.

[63] *See* Comments of Hughes which indicate that construction approval requirements may differ for small satellite antennas and inner-city cable construction.

[64] *See Notice* at paras. 17-21. Any ordinance enacted solely for the purpose of giving economic protection to a cable system might be invalid under state law. *See* Comments of League at 12

stringent procedural requirements only on applications for satellite antennas and thus would differentiate in the treatment of other antenna facilities. This ordinance would be subject to preemption under our final rule because it would not comply with paragraphs (a) and (b).

32. Non-federal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment.[65] An ordinance attempting to regulate all antennas by enacting restrictions on those of a certain shape, for example a ban on all spherical antennas, would differentiate between satellite antennas and other types of facilities and therefore would be preempted under our rule. Communities wishing to preserve their historic character may limit the construction of "modern accoutrements" provided that such limitations affect all fixed external antennas in the same manner.[66] In adopting this rule we intend that it be a valid accommodation of local interests as well as of two federal interests, namely

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which cites 8 McQuillin. The Law of Municipal Corporation, Sec. 25.61 at 161 (3d. ed. 1971) for the proposition that zoning ordinances must be equal in operation and effect.

[65] Some Commenters claim that the impact on interstate commerce and not discriminatory treatment is the proper focus of a preemption action. *See, e.g.*, Comments of Curtis Mathes and Hughes. It is precisely our concern that states are impermissibly burdening interstate satellite service that leads us to issue this preemption.

[66] *See* Comments of National Trust, National Capital Planning Association, Space.

promoting interstate communications and historic preservation.[67] Communities which are truly concerned with preserving their unique historic character may do so if they do not discriminate against satellite receive-only antennas.

33. If a community chooses to enact an ordinance which differentiates in its treatment of different types of antennas, it must bear a high burden. Our objective is to ensure that satellite receiving antennas are not treated less favorably than other antenna devices such as Amateur Radio antennas and Satellite Master Antenna Systems (SMATVs).[68] A community must demonstrate that

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[67] The National Trust states that sections 106 & 110 of the National Historic Preservation Act, 16 U.S.C. 470 *et seq.*, requires us to consult with them prior to rulemaking. Even if the assertion is correct, the National Trust had full opportunity to comment and its comments have been considered in formulating the final rule.

[68] *See, e.g.*, Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, 50 Fed. Reg. 38813 (September 25, 1985) where we stated: "State and local regulations that operate to preclude amateur communications in their communities are in direct conflict with federal objectives and must be preempted." *See also* Earth Satellite Communications, Inc., *supra* note 16, where we stated: "we do not wish to preclude a state or locality from exercising jurisdiction over certain elements of an SMATV operation that properly may fall within its authority, such as zoning or public safety and health, provided the regulation in question is not undertaken as a pretext for the actual purpose of frustrating achievement of the preeminent federal objective and so long as the nonfederal regulation is applied in a nondiscriminatory manner. Local authority over such concerns must be exercised so that a local jurisdiction in fact does not inhibit or interfere with the delivery of interstate signals through the exercise of its authority."

its regulation meets both paragraphs (a) and (b) of our rule. With respect to paragraph (a), we agree with the commenters who said that our original proposal should be recast to reduce undefined and vague terms.[69] The rule has been revised in an effort to respond to that criticism, but any general policy formulation will have aspects subject to varying interpretations.

34. We have retained the use of health, safety and aesthetic objectives[70] but have merely required these to be "reasonable" and "clearly defined." These terms are readily susceptible to application by local authorities and give some flexibility in the application of local regulations to individual locations.[71] To be more specific in a general national policy statement would be inadvisable.[72] In addition, requiring local authorities to justify a differentiation in treatment will help ensure that local zoning power is not used to restrict unreasonably the installation of satellite receive-only antennas.

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[69] Such terms as "valid", "clearly demonstrable" and "direct and tangible relationship" were in this category. *See* comments of National Satellite Cable Association.

[70] We find that the National Capital Planning, Association's suggestion to include "security" as a criteria has no relevance to the issues raised here as national security issues relating to communications are subject to federal, not state, jurisdiction.

[71] It was such flexibility that many cities insisted was necessary if they were to exercise legitimate zoning powers. *See* Comments of David J. Preese; League at 7.

[72] For example, we cannot say that the requirements of 10 as opposed to 5 bushes of a certain kind or size for screening of satellite antennas is unreasonable without becoming involved as a national zoning arbitrator, a result we sought to avoid in our *Notice*.

35. Although many commenters have argued that all aesthetic regulation should be preempted,[73] or severely restricted,[74] under prevailing law, aesthetics are permissible regulatory objectives. The preservation of such community values has been sustained even in light of first amendment challenges. Thus, any preemption which failed to recognize this strong local interest would not be sound.[75]

36. In addition to defining the reasonable objective of an ordinance which differentiates in its treatment of antennas, a community is limited in the types of restrictions it can apply. It cannot unreasonably limit or prevent reception by requiring, for example, that a receive-only antenna be screened so that line of sight[76] is obscured. Moreover, an ordinance which discriminates cannot

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[73] *See* Comments of Curtis Mathes.

[74] *See* Comments of Space.

[75] *See Notice* at n. 21 and cases cited there where we noted the Supreme Court's requirements of careful scrutiny of local aesthetic regulations which involve first amendment considerations. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). *See also* Canton v. Brenner, No. 85 CT 3551. L.I.M.A. Partners v. Borough of Northvale, Doc. No. 17049-84(PW) (May 10, 1985). Because we are relying on our statutory authority under the Communications Act as a basis for preemption, we are not reaching first amendment issue raised in connection with the proceeding.

[76] A receive-only antenna must have an unobstructed line of sight to a satellite in order to receive signals. It has been asserted by SPACE that cities, in enacting zoning ordinances, were sometimes unaware of the technical requirements for reception. Reply Comment at 4.

impose size restrictions only on receive-only antennas which would effectively preclude reception.[77]

37. As a further standard we are requiring that any local restriction which fails to meet our discrimination tests must not impose costs which are excessive in light of the costs of the equipment. Again, in a general policy statement, it is inadvisable to specify what "excessive" would mean in a particular situation but we are confident that local authorities who are familiar with local situations will be capable of making accurate distinctions.[78] If antenna users are not satisfied with the results of local determinations, it would be within the ability of a court to make legal determinations of reasonableness or excessiveness.

38. The requirements of paragraph (b) are more specific and more easily applied than our original "less restrictive means" test. We agree with some commenters that the proposed requirement would be difficult to apply and might lead to unintended results.[79]

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[77] Under current technology, an antenna must be at least 8 to 12 feet in diameter to adequately receive video signals transmitted by satellite. Space Reply Comments at 15 n. 7. Antenna size for Direct Broadcasting Service reception can be much smaller but that service has not as yet been instituted.

[78] This is the type of flexibility that cities have said they need to effectively enforce their zoning power. *See* Comments of Midland, Mich.; Pinellas Park, Fla.; Carmel by the Sea, Ca.; Connecticut Siting Council. Examples of excessive costs might be high filing fees or unreasonable hearing requirements.

[79] *See, e.g.*, Comments of Trust at 2.

C. Alternatives

39. It has been suggested that instead of adopting a general policy statement, we should review specific zoning cases to determine if preemption is warranted in individual situations.[80] We rejected this approach in our *Notice* and disagree with the APA and others that the administrative burden created by case-by-case review will be minimal. Initially, as we stated in the *Notice*, we do not intend to operate as a national zoning board. Those cities commenting have consistently indicated their opposition to Commission involvement in local disputes and such individual review will increase rather than decrease a national presence. By issuing a rule, we expect that local authorities will conform their regulations to our standards and that they will make determinations which are in the best interests of their communities that reflect federal policy. Commission intervention in individual cases as a general policy will not further this objective.

40. We also disagree with the suggestion that if we impose a stringent threshold discrimination test, we need not adopt a general rule and could minimize the extent of Commission involvement in a policy which would instead require case-by-case review.[81] There has been increased interest and publicity surrounding this issue and we conclude that the large number of cases which might be presented for individual review would place a severe burden on our administrative process. Satellite

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[80] *See* para. 14 *supra*.

[81] Our preemption is broader than that suggested by APA by requiring that discriminatory ordinances be justified.

antenna users who are dissatisfied with the results of any local zoning decision can use the standards adopted here in pursuing any legal remedies they might have.[82] In addition, we would entertain requests for further action if it appears that local authorities are generally failing to abide by our standards.[83] Any party requesting Commission review of a controversy will be expected to show that other remedies have been exhausted.

41. Many of the comments submitted urge us to include transmitting antennas in our preemption. Transmitting equipment, while visually similar to receive-only earth stations, does raise regulatory issues with respect to health and safety because of the emission of radio frequency radiation (RF radiation). This Commission has declined to preempt state or local RF radiation standards but has reserved this issue if it is brought to our attention that such standards are "adversely affecting a licensee's ability to engage in Commission authorized activities."[84] On the record before us, it would be premature to preempt health or safety standards, especially where our *Notice* indicated that issues with respect to transmitting equipment would be excluded.[85]

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[82] As Hughes observes "the preemption standard is intended to be operational, and enforceable by private parties, without further involvement of the agency." Comments at 8.

[83] *See* Comments of USSB.

[84] Responsibility of the Federal Communications Commission to Consider Biological Effects of Radio Frequency Radiation when Authorizing the Use of Radio-Frequency Devices, FCC 85-90 (released March 14, 1985) at para. 43.

[85] *Notice* at para. 27.

42. However, we see no similar impediment to the preemption of discriminatory, non-justified aesthetic regulation of transmitting antennas. There are no significant differences in the visual appearance of transmit and receive-only facilities and the same federal interest exists with respect to local restriction of access to satellite services. Thus, if a state or local regulation based on aesthetics differentiates between satellite transmitting antennas and other types of antennas, it is preempted as described in the rule adopted herein unless it has a reasonable aesthetic purpose and does not operate to unreasonably restrict or prevent transmission. At this time, we are reserving the issue of preemption based on the health and safety aspect of RF radiation for consideration in a separate proceeding.[86] In taking this action, however, we are not preempting non-federal authority distinctions based on land use criteria such as those designating certain areas for residential, commercial or other uses.

43. We decline to attach a list of acceptable sample zoning ordinances. As has been repeatedly stated here, our preemption is intended to afford local communities some flexibility. Sample laws would curtail this flexibility. Moreover, a list of specific rules would be incomplete and could lead to circumvention of our objectives.[87]

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[86] The rulemaking requested in RM-5021 specifically addresses this issue. *See* note 39, *supra*.

[87] Comments of SPACE at 14.

D. Other Issues

44. We agree with Space that our rulemaking does not violate either the National Environmental Policy Act or the Regulatory Flexibility Act. We are not authorizing the construction of any antenna facilities in this proceeding but merely are stating guidelines for local authorities. Thus, the NEPA regulations with respect to "major actions" do not apply. Because we are adopting a policy which will ultimately be reflected in individual local regulations including those based on aesthetics, we are taking no action in this proceeding which significantly affects the "quality of the human environment."[88]

45. In our *Notice*, pursuant to section 603 of the Regulatory Flexibility Act, we stated that our rule would have a beneficial effect on local governments by affording guidance as to acceptable limits of governmental action. We adhere to this conclusion in adopting a final rule. Our objective in this proceeding is to avoid inconsistent local regulations which unreasonably restrict interstate communications. Any exemptions for small communities such as suggested by the League would certainly frustrate this objective. Our policies must be applied by all local jurisdictions and the commenters have not demonstrated why smaller communities should not be subject to our rule.

46. It has been argued by the District of Columbia and by the National Capital Planning Association that zoning ordinances in the District of Columbia cannot be

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[88] *See* 47 CFR 1.1301.

preempted because they are promulgated under federal authority. However, it has been held that this factor is not of decisional significance in a federal preemption action.[89] With respect to federally controlled locations, it is presumed that federal authorities will follow the policy adopted here.

IV. Conclusion

47. Accordingly, pursuant to sections 151, 303, 403 and 705 of the Communications Act, it is ordered that Part 25 of Chapter I of Title 47 of the Code of Federal Regulations is amended as set forth in Appendix B, effective March 14, 1986.

48. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 604, we make the following determination. The policy adopted herein is intended to preempt local regulations which are interfering with the federal objective of promoting interstate satellite delivered communications. Local governments of all sizes would be affected by our rule. In addition, small businesses selling receive-only antennas would possibly be benefited by an enhanced competitive market. The National League of Cities has objected stating that we have not considered as an alternative the exemption of small governments from the

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[89] Columbia Plaza Limited Partnership v. Cowles, 403 F.Supp. 1337, 1341 n. 11 (Dist. Ct. D.C. 1975). In this case, the court found that the fact that the District of Columbia's rent control program was established pursuant to a federal enabling statute did not by itself indicate a congressional intent that the area of regulation should not be preempted.

rule's operation. We conclude that any such exemption would result in undesirable inconsistencies which might impede the distribution of interstate communications. There are no effective alternatives.

49. It is further ordered that the Secretary shall cause this Report and Order to be published in the **Federal Register.**

50. It is further ordered that the Petition for Declaratory Ruling filed by United Satellite Communications, Inc. is granted in part and denied in part as set forth above.

51. It is further ordered that the proceedings in CC Docket No. 85-87 are terminated.

Federal Communications Commission.

William J. Tricarico,

Secretary.